20352
OCT 24 1902
JAMES H. McKENNEY,
Clerk

No. 177.

(18,283.)

Reply Brief of Bradford & Winter
for Appellant

Supreme Court of the United States.

Filed Oct. 24, 1902.

On Appeal from the U. S. Circuit Court for the District of Indiana.

THE INDIANA MANUFACTURING COMPANY,
Appellant,
vs.
ARMIN C. KOEHNE, *et al.*,
Appellees.

No. 177.
IN EQUITY.
October Term,
1902.

Amended.

BRIEF FOR APPELLANT

AND

REPLY TO APPELLEES' BRIEF.

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IN THE

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THE INDIANA MANUFACTURING COMPANY, *Appellant (Complainant below),* *vs.* ARMIN C. KOEHNE, *et al.*, *Appellees (Defendants below.)*	No. 177. IN EQUITY. October Term, 1902.

BRIEF FOR APPELLANT.

May it Please the Court:

The pages noted thus (p. ....) are those of the printed record. Quotations are indented.

The record in this case consists of the bill (pp. 1-16); the temporary injunction *pendente lite* (p. 18); an amendatory and supplemental bill bringing in the taxation made after the original bill was filed (pp. 18-20); demurrers by the defendants (pp. 21-23); the decree by the Court dismissing the bill for want of equity (p. 24); and the various papers necessary to the taking and perfecting of the appeal (pp. 24-26.)

STATEMENT OF THE CASE.

The broad and important question presented for decision is:

I. Are Letters Patent of the United States taxable under State or Municipal authority?

This question in this case will also be presented in the following form:

II. Is the stock of a corporation which consists wholly of Letters Patent of the United States, taxable as stated?

A second question raised here is:

III. Was such a suit as this maintainable in a United States Circuit Court, or should recourse have been had to the Courts of the State of Indiana?

Incidentally to this second question, we may be asked:

IV. Does the controversy, under the circumstances involved, present a case for equitable relief, or ought remedies to have been sought at law?

The court below filed no written opinion; but indicated, in announcing his decision orally, that on the *first* and *main* question his views were with the complainant, but on the *second* question he considered that the law was with the defendants, and therefore sustained the demurrers and dismissed the bill for want of equity. These questions will therefore be discussed in inverse order, as the questions of jurisdiction and procedure are first to be determined.

ASSIGNMENT OF ERRORS.

The following (p. 25) are the errors assigned:

First. That the court erred in holding that the complainant had an adequate remedy at law.

Second. That the court erred in holding that the complainant had a suitable and adequate remedy under the laws of the State of Indiana.

Third. That the court erred in holding that the bill of complaint herein is without equity.

Fourth. That the court erred in sustaining the demurrers of the defendants.

Fifth. That the court erred in not overruling the demurrers of the defendants.

Sixth. That the court erred generally in its decision and decree in this case, and particularly in this, in dismissing complainant's bill of complaint.

ARGUMENT.

III. Was such a suit as this mantainable in a United States Circuit Court, or should recourse have been had to the Courts of the State of Indiana?

The case is one arising "under the Constitution and Laws of the United States," so that a *federal question* is involved; and (p. 16) "the sum or value in dispute exceeds, exclusive of interests and costs, the sum or value of two thousand dollars."

The bill alleges, in effect, that the taxation in question was authorized and required by "certain statutes" or laws "of the State of Indiana," which laws are claimed to be "in contravention of the Constitution and Laws of the United States" (p. 3) and therefore void, because patent rights granted by the United States can not be subjected to State taxation.

It further appears that the obligation of the *contract* existing between the inventor and the general public is impaired by such taxation.

A party having a grievance of this character, involving a Federal question, has a right to go into a Federal Court for the purpose of having such question there determined, under the act of March 3, 1887, as corrected by the act of August 13, 1888, which act (second edition supplement to Revised Statutes, p. 611), contains the following:

> . . . . the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. . . .

There are many decisions affirming the jurisdiction of the United States Courts where Federal questions are involved. The Circuit Court of the United States for the Eastern District of Louisiana, by PARDEE, C. J. (BILLINGS, D. J., concurring), said:

> The second plea is to the jurisdiction of the court, on the ground that both complainant and defendant are citizens of Louisiana. The *federal question* involved in this suit, to-wit, the *constitutionality* of certain articles of the constitution of the State of Louisiana under which the defendant claims and exercises rights which impair the validity of complainant's contract, making a case in equity arising under the Constitution and laws of the United States, gives the court jurisdiction. This is no longer an open question.
>
> *Crescent City, &c. Co.* v. *Butchers' Union, &c. Co.*, 12 Fed. Rep., 225–226.

In the case of *Starin et al.* v. *New York City*, 115 U. S. 248 (29 L. ed. 388), this Court stated the rule, and collated the authorities, as follows:

> The character of a case is determined by the questions involved. *Osborn* v. *Bank of U. S.*, 9 Wheat. 824. If from the questions it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise, not. Such is the effect of the decisions on this subject. *Cohens* v. *Virginia*, 6 Wheat. 279; *Osborn* v. *Bank of United States*, 9 Wheat. 824; *The Mayor* v. *Cooper*, 6 Wall, 252; *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 201; *Tennessee* v. *Davis*, 100 U. S. 264; *Railroad Co.* v. *Mississippi*, 102 U. S. 140; *Ames* v. *Kansas*, 111 U. S. 462; *Kansas Pacific* v. *Atchinson R. R. Co.*, 112 U. S. 416; *Provident Savings Soc.* v. *Ford*, 114 U. S. 641; *U. Pacific R. R. Removal Cases*, 115 U. S. 11.

Even in cases where the jurisdiction of a U. S. Court depends only upon diverse citizenship of the parties, and no constitutional question is involved, its equitable jurisdiction cannot be ousted by the fact that a remedy at law may exist under State statutes:

In the case of *McConihay* v. *Wright*, 121 U. S., 201 (30 L. ed. 932), it was contended that under the statutes of West Virginia an action in ejectment might have been maintained,

and that, therefore, the case was not one of equitable jurisdiction because the complainant had a complete and adequate remedy at law. This Court held that:

> Admitting this to be so, it, nevertheless, cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established. That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States by the Constitution and Acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several States regulating the practice of their own courts. Bills *quia timet*, such as the present, belong to the ancient jurisdiction in equity, and no change in State legislation giving, in like cases, a remedy by action at law, can of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Act of Congress.

This is reasonable. If it were otherwise, United States Courts might be ousted of their jurisdiction in equity in all cases by the simple expedient of passing a State statute something as follows:

> "Be it enacted, &c., that a court, to be known as the . . . . . Court of the State of Indiana, is hereby established to try all cases of which the Circuit Court of the United States for the District of Indiana might otherwise have equitable cognizance."

The untenability (if not absurdity) of the proposition can certainly need no further illustration.

Likewise where other questions are involved jurisdiction will be maintained. This Court—in a somewhat different connection—has said:

> Nor is it any objection that questions are involved which are not all of a Federal character. If *one* of the latter exists—if there be a *single* such ingredient in the mass—it is sufficient. That element is *decisive* upon the subject of jurisdiction.
>
> *Mayor, &c. of Nashville* v. *Cooper*, 6 Wall, 254 (18 L. ed. 851.)

The foregoing seems to be conclusive in respect to the jurisdiction of a United States Circuit Court to try a case involving the questions at issue.

IV. Does the controversy, under the circumstances involved, present a case for equitable relief, or ought remedies to have been sought at law?

Under the statute above referred to complainant had, at its own election, the clear right to bring its proceedings in the Federal Court. Having that right, it must bring its action in a *form* to enable the Court to adequately act concerning the subject-matter. From the nature of things a suit at law could not be effective in a Federal Court in a case like this. The bill (pp. 14-15) alleges:

> And your orator further shows unto your honors that the defendant Armin C. Koehne is the Treasurer of Marion county, Indiana, whose duty it is as such Treasurer, under the laws of the State of Indiana, to receive and collect taxes for the said State of Indiana, and also for Marion county in said State, and also for the city of Indianapolis within said county, and also for the School Board of the city of Indianapolis, Indiana. That a large proportion of the amounts received and collected by the said defendant as Treasurer, as aforesaid, are for and on account of and for the benefit of the *State of Indiana*, a sovereign State, and one of the United States, and that under the Constitution and laws no suit can be maintained against the State of Indiana. That it is a part of the duty of the said defendant Armin C. Koehne, as aforesaid, to pay over *into the Treasury of the State of Indiana* a large proportion of the amounts so received and collected by him as taxes, and, therefore, that if said amounts are so collected and received and paid over, they will become mixed with the moneys of the said State, and thus *be beyond reach of any process of this or any court*, and irrecoverable, *and that great and irreparable injury will result to your orator if such unlawful collection and paying over as aforesaid be not prevented.* Further that were it possible to recover such moneys after payment a *multiplicity of suits* would be necessary.

A suit in equity, therefore, was not only a proper suit under the circumstances, but the *only* effective kind of suit which could be brought in the Federal Court, to which complainant, with its Federal question, had the right to go.

The true rule for the application of equitable remedies has been laid down by this Court, and is well summarized in the following:

> The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle depends upon the character of the *particular case* as disclosed in the pleadings. The remedy at law must always be plain and adequate, and as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. *Watson* v. *Sutherland*, 5 Wall., 78; *Boyce* v. *Grundy*, 3 Pet., 210; *Payne* v. *Hook*, 7 Wall., 430.

The foregoing is quoted from GOULD AND TUCKER'S NOTES, Vol. 1, p. 99, and the second sentence is substantially a literal quotation from *Watson* v. *Sutherland*, and *Boyce* v. *Grundy*.

This has also long been the established rule in Indiana, as declared by its Supreme Court in 34 Ind., 124; 44 Ind., 261; 67 Ind., 448; 98 Ind., 4; 113 Ind., 26, and 130 Ind., 549, in each of which cases it has quoted with approval the above mentioned extract from *Watson* v. *Sutherland*.

How to proceed against officers acting under an unconstitutional law is indicated in the case of *Allen* v. *B. & O. R. R. Co.*, 114 U. S., 311 (29 L. ed. 200), where this Court, quoting from *Board of Liquidation* v. *McComb*, 92 U. S., 531, declared it to be

> well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and *injunction* are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the

non-performance or violation of his duty, it will not prevent the issuing of the writ. **An unconstitutional law will be treated by the Courts as null and void.**

It seems clear enough that if an *injunction* is a proper remedy, a *suit in equity* is a proper proceeding.

THE FACTS.

This case having been decided on demurrer, its result must be wholly dependent upon the allegations of the bill, which, of course, are to be taken as true.

From the bill it clearly appears that the taxation complained of is under a statute of the State of Indiana. This especially appears from the allegations of one paragraph of the bill (p. 3) reading as follows:

> Your orator further shows unto your honors that the State of Indiana has enacted and is attempting to enforce certain statutes requiring the taxation of "patent rights" or letters patent of the United States, the provisions of said statutes in question being comprised in the act of the General Assembly of the State of Indiana, approved March 6, 1891, which by Section 50 requires that
>
> > Every person required by this act to make or deliver such statement or schedule shall set forth an account of property held or owned by him, as follows:
> >
> > . . . . . .
> >
> > Seventh. All patent rights describing them, and giving the number of each patent, and the value of each.
>
> and which in section 53 has prescribed and enacted a form of "schedule" which all property-owners are required to follow in returning their property for taxation, in and by which said schedule the "number of patent rights and value" are required to be returned for taxation in common with other personal property. And your orator says that the said statutes of the State of Indiana requiring the taxation of "patent rights" or letters patent so as aforesaid are in contravention of the Constitution and laws of the United States, and are unconstitutional, invalid and void.

The preceding paragraph of this bill alleges that the complainant is a private corporation; that it had an original capital stock of $200,000; which was afterwards increased to

$360,000; and that certain interests in certain Letters Patent were assigned to it for and in consideration of the whole amount of its said original and increased capital stock, and

> that such interests in said Letters Patent *became* and *were* its *entire* capital stock, no portion of which was ever paid in in money or other property; that your orator *has not now* and *never has had any other or different capital stock* than that herein described; so that the entire value of the capital stock of your orator *consists and always has consisted wholly of Letters Patent of the United States, and neither includes nor represents any other matter or thing of value whatsoever.*

The bill further shows that the complainant made full return of *all* its property, of every character and description, save and except the Letters Patent in question, and has paid *all* taxes due on said property.

After making the detailed allegations in respect to the taxation for the several years complained of, the bill (pp. 13–14) continues:

> Your orator further shows unto your honors that the returns for taxation made by it in the said several years 1893, 1894, 1895, 1896, 1897 and 1898, and each and every of them, contained full and complete statements of your orator's property, and that all such property and assets without exception or reservation were fully and completely returned at their full cash value, except in so far as your orator declined to return its Letters Patent for taxation. That in so far as your orator's capital stock had or has any value whatever, it was and is solely and exclusively derived from its Letters Patent as aforesaid and not otherwise. That your orator has not now and never has had any property or assets of any description saving and excepting only the said Letters Patent which could lend or impart any value to its capital stock. *That your orator's indebtedness is now and always has been an amount largely in excess of the value of all its property and assets of every description saving and excepting only its Letters Patent.* That except for its ownership of said Letters Patent your orator would now be and would always have been *insolvent*, and its capital stock *worthless. That no money or property, of any character or description, was ever paid in to your orator, as, for, or on account of its capital stock, saving and excepting only its said Letters Patent.* And

> your orator further charges and avers that these facts *are now* and ***always have been*** *well known* to the defendants, who, nevertheless, having heard that your orator was in receipt of a large income from its said patents, and that its stock was for that reason regarded as of large value by the owners thereof, without right or authority, and in usurpation of powers whereof they were not possessed, have exercised or pretended to exercise the *sheerly capricious right* to tax the Letters Patent owned by your orator under the guise and pretext of taxing your orator's capital stock, which, *as defendants at the time well knew*, had no value whatever except as it represented was derived from or consisted in your orator's said patents. And your orator avers that the assessment for taxation so as aforesaid made in each of said years was, except as to the value returned by your orator in each of said years other than said Letters Patent, **based solely and exclusively upon the value as estimated by said county board of review and said State board of tax commissioners of said Letters Patent** and of said capital stock as derived from said Letters Patent, and *not* upon any other or different value or property. All to the great and manifest wrong, damage and injury of your orator, and in defiance of your orator's rights in the premises, and in violation of the Constitution and laws of the United States.

The prayers of the bill (p. 16) are for relief from any assessment and valuation for taxation of complainant's letters patent made *directly* or *indirectly* by the defendants, or either or any of them.

If the facts thus pleaded do not raise a Federal question, it seems difficult to imagine how such a question could be raised, or upon *what* facts a Federal question could be said to be predicated.

FEDERAL FRANCHISES NOT TAXABLE.

We now come to the main question:

I. Are Letters Patent of the United States taxable under State or Municipal authority?

This Court, by Mr. Chief Justice TANEY has declared:

> *The Powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate*

and distinct sovereignties, acting separately and independently of each other, within their respective spheres.

Ableman v. *Booth*, 21 How. 506 (16 L. ed. 169).

And Mr. Chief Justice MARSHALL said:

All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

McCulloch v. *Maryland*, 4 Wheat. 429 (4 L. ed. 607.)

Section 8 of Article 1 of the Constitution of the United States, enumerating the powers of Congress, includes that:

> To promote the progress of science and useful arts, by securing for limited times to authors and inventors the **exclusive** right to their respective writings and discoveries.

In pursuance of the authority thus given, Congress has enacted laws under which Letters Patent for new inventions are granted to inventors or their assignees:—and that section pertinent to the present inquiry reads in part as follows:

> SEC. 4884. Every patent shall contain . . . . . a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the **exclusive** right to make, use, and vend the invention or discovery throughout the United States, and the Territories thereof.

Quoting from the grant forming part of one patent so issued, we find that the form adopted agrees with the Constitution and the statute:

> Now therefore these LETTERS PATENT are to grant unto the said The Indiana Manufacturing Company, its successors or assigns, for the term of seventeen years from the twenty-seventh day of March, one thousand eight hundred and ninety-four, the **exclusive** right to make, use and vend the said invention throughout the United States and the Territories thereof.

It will be observed that the word used in the Constitution, in the Act of Congress, and in the Patent itself, is the

word "EXCLUSIVE." A patent is a *franchise*,—an **exclusive** franchise,—to the inventor or his assignee. It is his to enjoy freely, and, like other franchises granted by the General Government, without any burdens or restrictions except such as are or may be imposed under the Constitution of the United States and laws of Congress made in pursuance thereof. Certainly such a franchise can not be subjected to the burdens of State or municipal taxation. The applicable decisions are believed to sustain this view.

In *California* v. *Central Pacific R. R. Co.*, 127 U. S., 1 (32 L. ed. 150), this Court, in considering a question essentially the same, say:

> how can it be *possible* that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? . . . . . Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us **almost absurd** to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the Government that confers it. To tax it is not only derogatory to the dignity, but *subversive of the powers*, of the Government, and *repugnant* to its paramount sovereignty.
>
> It is unnecessary to cite cases on this subject. The principles laid down by this Court in *McCulloch* v. *Maryland*, *supra*; *Osborn* v. *Bank of U. S.*, 22 U. S., 9 Wheat., 738, and *Brown* v. *Maryland*, 25 U. S., 12 Wheat., 419, and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are **not in conflict** with the decisions of this Court in *Thomson* v. *Union Pacific R. R. Co.*, 76 U. S., 9 Wall., 579, and *Union Pacific R. R. Co.* v. *Peniston*, 85 U. S., 18 Wall., 5. As explained in the opinion of the Court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations. 85 U. S., 18 Wall., 35.

In the great case of *McCulloch* v. *Maryland*, 4 Wheat. 316, (4 L. ed. 579), Mr. Chief Justice MARSHALL, in delivering the unanimous opinion of the Court, said:

If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatability of a right in one government to destroy what there is a right in another to preserve.

. . . . . .

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositiôns not to be denied.

. . . . . .

If we apply the principle for which the State of Maryland contends, to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

If the States may *tax* one instrument, employed by the government in the execution of its powers, they may tax *any and every other* instrument. They may tax the mail; they may tax the mint; **they may tax patent-rights**; they may tax the papers of the custom-house; they may tax judicial process; they may tax

> all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.
>
> . . . . . .
>
> The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have *no power*, by *taxation* or otherwise, to retard, impede, *burden*, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

See also *Osborn* v. *Bank*, 9 Wheat., 738 (6 L. ed. 204.)

Federal Courts are not alone in these views. The non-taxability of patents has several times been recognized and declared by State courts.

The Supreme Court of the State of Michigan, speaking by Judge COOLEY, has expressly recognized and declared that:

> Any State legislation which undertakes to limit or restrict in any manner the privilege which the Letters Patent confer is an *invasion* of the sphere of national authority, and therefore *void*.
>
> *People* v. *Russell*, 49 Mich., 617.

In this case they cited with approval *Cranson* v. *Smith*, 37 Mich., 309, in which it was said:

> In those cases where the congressional power is lawfully exercised, it is *supreme*.
>
> . . . . . .
>
> The Constitution of the United States not only allows but favors the special protection of inventors. The measure of that protection, and its conditions, can not be fixed by any power but Congress, and the remedy for abuses or defects in the legislation of that body must be found in its own revision of its own laws. It is not competent for State statutes to deal with them or to revise the national policy.

For other decisions by State courts of last resort see *post*, (pp. 18–21), where decisions from New York and Pennsylvania are quoted from and discussed.

The subject of interstate commerce has given rise to many questions which bear a strong analogy to those now under consideration, and which this Court has been called upon to consider.

In the case of *Robbins* v. *Taxing District of Shelby County*, 120 U. S. 489 (30 L. ed. 694), this Court said:

> Certain principles have been already established by the decisions of this Court which will conduct us to a satisfactory decision. Among those principles are the following:
>
> . . . . . .
>
> 2. Another established doctrine of this Court is that, where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions;
>
> . . . . . .
>
> 3. It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws is when, by virtue of its *police power*, and its jurisdiction over persons and property within its limits, a State provides for

—various matters not necessary here to enumerate.

Applying these principles to the present case, it may be said that the power of Congress respecting patents under the Constitution has been exercised, and it having failed "to make express regulations" respecting the taxation of patents, "indicates its will that the subject shall be left free from any restrictions or impositions"; subject, nevertheless, of course, to the *police power* of the States, as held by this Court in *Patterson* v. *Kentucky*, 97 U. S., 501 (24 L. ed. 1115), and in *Webber* v. *Virginia*, 103 U. S., 344. (26 L. ed. 265.) In the latter case the following language is used:

> It is only the right to the invention or discovery, **the incorporeal right,** WHICH THE STATE CAN NOT INTERFERE WITH.

In the case of *Philadelphia & Southern Mail Steamship Co.* v. *Pennsylvania*, 122 U. S., 326 (30 L. ed. 1200), this Court, in further discussion of these questions, used the following language:

> In view of the decisions of this Court, it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the *principal* forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly, this could not be done by the State without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the States upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to interstate commerce, *its inaction*, as we have often held, *is equivalent to a declaration that it shall be free, in all cases where its power is exclusive; and* **its power is necessarily exclusive whenever the subject matter is national in its character and properly admits of only one uniform system.**
>
> . . . . . .
>
> **Nor does it make any difference whether such commerce is carried on by individuals or corporations.**
>
> . . . . . .
>
> The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but *in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection*, interstate or foreign commerce, **or any other matter exclusively within the jurisdiction of the Federal Government.**

In *Leloup* v. *Port of Mobile*, 127 U. S., 640 (32 L. ed., 311), this Court stated that "upon the fairest and most just construction of the Constitution"

> no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.

So we say that a State has no right to lay a tax on patent rights "in any form," whether directly upon the patents themselves, as required by the Indiana statute, or upon the stock of a corporation issued for and representing such patents, for the reason "that such taxation is a burden" upon the Federal franchise granted by the Government of the United States, "and amounts to a regulation of it, which belongs solely to Congress."

In *Crutcher* v. *Commonwealth of Kentucky*, 141 U. S., 47 (35 L. ed., 649), this Court said:

> We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it.

We say here "that a state law is unconstitutional and void" which requires a party to pay a tax on a patent right, directly or indirectly, "no matter how specious the pretext may be for imposing it."

Attention is also called to the case *In re Sheffield et al.*, 64 Fed. Rep., 833. In this case the defendants, Sheffield and Edmunds, were arrested in a prosecution for selling patent rights without payment of a *license* ***tax*** prescribed by a statute of the State of Kentucky. The prisoners were taken before the United States Court at Louisville, on a writ of *habeas corpus*. Judge BARR discharged the petitioners, and, in the course of his opinion, made the following pertinent statements:

> Thus the question must be, can a State tax, or authorize a county or city to tax, a right—an incorporeal right—which is granted by the United States, and which, under the Constitution, can alone be granted by the United States? We think that question must be answered in the negative, under the principle settled in the case of *McCulloch* v. *State of Maryland*, 4 Wheat., 316, and the many subsequent cases.
>
> . . . . . .
>
> But **the patent right itself,** *i. e.* the right to exclude all others from the manufacture, use, or sale of the invention or discovery, which is a grant by the United States, **can not be taxed by a State.**
>
> . . . . . .

We conclude the statutes of Kentucky, under which the petitioners, Sheffield and Edmunds, are prosecuted and imprisoned, are *unconstitutional and void.*

It is very gratifying to counsel to find, in a decision written since the greater portion of his brief was originally prepared, such a literal and exact concurrence with his views.

It is no new thing for the State of Indiana to attempt illegal forms of taxation. In 1873 it was attempted to tax the gross receipts of transportation companies. In June, 1876, Judge DRUMMOND decided that law unconstitutional.

Indiana v. *American Express Co.*, 7 Biss., 227; Fed. Cas., No. 2,071.

This brief so far has proceeded upon the assumption that the taxation complained of will be, under the allegations of the bill, treated as though made upon the patents, in effect and actually, if not nominally.

It is, however, anticipated that a strenuous effort will be made to differentiate between appellant's patents and stock, and to make it appear that in nominally taxing the latter appellees have succeeded in evading conflict with United States law. This leads us to a particular discussion of the *form* of question suggested near the beginning:

II. Is the stock of a corporation which consists wholly of Letters Patent of the United States, taxable as stated?

The authorities seem to be quite as clear on this form of the question as on the other. While the exact question involved and in the form here presented has probably not before been passed on by a Federal Court, it seems to have several times been before the Courts of last resort of some of our more important States, and has by them been most carefully considered with substantially uniform result.

The Michigan cases have already been referred to.

The case of *Commonwealth* v. *Edison Elec. Lt. Co.*, 157 Pa. St. Rep., 529, is believed to be absolutely on "all fours" with the present case, and clearly and conclusively decisive of the question. The decision is short, and reads as follows:

GREEN, J. The fourth finding of fact by the learned Court below, which is fully sustained by the testimony, declares that "thirty-five thousand dollars in cash and three thousand shares of stock were issued and paid by the defendant company to the Edison Electric Light Company of New York, for certain rights under its patents within the City of Philadelphia, and that without these rights the defendant could not carry on its business and furnish electric light to its customers." Also that "in consideration for said cash and stock paid to the Electric Light Company of New York, the defendant did not receive any tangible property whatever, but merely certain intangible rights or licenses under said letters patent." Also that "the defendant does not lease from any persons from whom said licenses were obtained any tangible property whatever, nor does it have in its possession any tangible property belonging to said persons."

This state of facts brings the case within the principle that **capital stock invested in patents or patent rights is not taxable under State laws,** as established by our decisions in the cases of

Commonwealth v. *Westinghouse Electric Co.*, 151 Pa. St., 265;

Commonwealth v. *Westinghouse Air Brake Co.*, 151 Pa. St., 276; and

Commonwealth v. *Philadelphia Co.*, 157 Pa. St., 527, in which the opinion has just been filed.

We are therefore of the opinion that the learned Court below was right in its ruling.

Judgment affirmed.

It may be said that in the Pennsylvania cases only a *part* of the stock was issued for the patents, and was, therefore, non-taxable. Counsel for appellant is unable to observe the distinction. *All* the stock *which* ***was*** *issued for patents* was held not to be taxable, and there is no intimation in the decision that if *all* the stock had been so issued that any different rule as to the remainder of it would have been recognized. In the case at bar, in fact, and according to the record, every dollar of the stock was issued for the patents, and for nothing else.

This matter has also, since the present litigation was begun, been the subject of adjudication in the courts of the State of New York.

September 7, 1897, the Supreme Court, Appellate Division, Second Department, in the case of *People ex rel. Edison Electric Illuminating Co. of Brooklyn* v. *Board of Assessors of City of Brooklyn*, held that stock of a corporation issued for patent rights was not taxable. In that case it was said:

> The relator, an electric light company, by its return to the board of assessors, and the evidence of its officers given before that board, showed that its capital stock was $3,750,000, all of which had been paid in in money, except the sum of $945,000, which was paid for patent rights.

The whole capital stock had been assessed for taxation, including that "paid for patent rights."

The Court, after giving the particulars, further said:

> On a review of the proceedings of the board of assessors by *certiorari*, an order was made by the special term wholly vacating the assessment. From that order this appeal is taken.
>
> We think the order of the special term correct. It is true that the market value of the share stock of the relator was par or better. This may have justified the conclusion that, in a certain sense, the stock of the relator was not impaired; but it did not justify, *in the face of positive evidence to the contrary*, the assumption that the capital stock, even if unimpaired, was represented by assets or property which, under the law of this state, are subject to local assessment. The exclusive privilege or franchise, under *Letters Patent of the United States*, acquired by the relator for the sum of $945,000, and carried by it at that value *was not subject to state or local taxation.*
>
> . . . . . .
>
> The order appealed from should be affirmed, with $10 costs and disbursements. All concur.
>
> 46 New York Supplement, 388.

An appeal was taken from the Supreme Court to the Court of Appeals of the State, which, on October 4, 1898, affirmed the decision of the Supreme Court, and, in the course of the opinion, said:

> The Constitution of the United States (article 1, § 8, subd. 8) conferred upon congress the power to "promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the ex-

clusive right to their respective writings and discoveries." In pursuance of this power, congress enacted that patents should be issued to inventors, which should secure to them for a limited term the "exclusive right to make, use and vend the invention or discovery throughout the United States and the territories thereof." Rev. St. U. S., § 4884. Patent rights are, therefore, granted under the Federal Constitution, and necessarily for the promotion of Federal purposes. *Grant* v. *Raymond*, 6 Pet., 218, 241; *Ames* v. *Howard*, 1 Sumn., 482, Fed. Cas. No. 326; *Blanchard* v. *Sprague*, 3 Sumn., 535, Fed. Cas. No. 1,518.

The Federal purpose is primarily to stimulate genius, talent, and enterprise by holding out that encouragement which patents give, but ultimately to secure to the whole community the great advantages that flow from the free communication of secrets, processes, and machinery. The next step is that, *patent rights being created under the Federal Constitution and laws for a Federal purpose, the States are without the right to interfere with them.* The right to tax a Federal agency constitutes a right to interfere with, to obstruct, and even to destroy the agency itself, for, conceding the right of the State to tax at all, then it may tax to the point of destruction.

. . . . . .

The Federal government having the right to create the agency, it necessarily has the right to protect it, not only from destruction, but from interference from any other government, whether such interference be in the guise of taxation, or otherwise, as the power to tax involves the power to destroy, and the power to destroy may render useless the power to create.

. . . . . .

The order should be affirmed. All concur. Order affirmed.

156 N.Y., 417; 51 Northeastern Reporter, 269.

The reasoning of the foregoing opinion is logical and consistent, and is believed to be conclusive.

If it should be suggested that capital stock, although paid up exclusively by the transfer of letters patent to the company, might have a value in excess of that of the letters patent, which excess value would be taxable, while all this might be conceded, yet in this case it would not avail appel-

lee. The complaint avers that the value of the letters patent was taken into consideration in ascertaining the value of the capital stock. The assessment does not separate the amount based upon the value of the letters patent, from the amount, if any, based upon a value in excess of that of the letters patent. Under such circumstances the assessment is void as an entirety.

This was held in *Santa Clara County* v. *Southern Pacific R. R. Company*, 118 U. S., 394 (30 L. ed. 118), and upon the authority of this case by the Supreme Court of Indiana in *Hart* v. *Smith*, 64 N. E. Rep., 661.

THAT WHICH CANNOT BE DONE DIRECTLY CANNOT BE DONE INDIRECTLY.

Certainly the taxation of the stock of a corporation can, at the most, only be said to be an indirect taxation of the property of the corporation of which the stock is composed. We are not dealing now with cases where there is a special tax on stock certificates, or an arbitrary tax on the corporation for the privilege of existing, which are widely different matters.

This Court, in the case of *Handley* v. *Stutz*, 139 U. S., 417, although in another connection, defined the relations of stock and property represented thereby, saying:

> The stock of a corporation is supposed to *stand in the place* of actual property of substantial value, and as being a convenient method of representing the interest of each stockholder in such property.

It seems hardly necessary to cite authorities for the proposition that that which can not be done directly can not be done indirectly. However, the following cases, controlling of the question, which also involve illegal taxation, are called to attention.

In the "License Cases," 5 How., 504 (12 L. ed. 256), Mr. Chief Justice TANEY, in discussing the power of taxation by a State of imports, said:

> It can not be done directly, in the shape of a duty on imports, for that is expressly prohibited. And as it can not be done directly, it could hardly be a just and sound construction of the Constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.

In *Brown* v. *Maryland*, 12 Wheat., 419 (6 L. ed. 678), the Court said:

> But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.
>
> It is impossible to conceal from ourselves that this is varying the form, without varying the substance. . . . All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . . So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution.

In *Crandall* v. *Nevada*, 6 Wall., 35 (18 L. ed., 745), it is said:

> It is claimed by counsel for the State that the tax thus levied is not a tax upon the passenger, but upon the business of the carrier who transports him.
>
> If the act were much more skillfully drawn, to sustain this hypothesis, than it is, we should be very reluctant to admit that any form of words which had the effect to compel every person traveling through the country by the common and usual modes of public conveyance to pay a specific sum to the State, was not a tax upon the right thus exercised.

In *Philadelphia & Reading R. R. Co.* v. *Pennsylvania*, 15 Wall., 232 (21 L. ed., 146), it is said:

> It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, ... It was to guard against the possibility of such . . . . embarrassments, no doubt, that the power . . . . was conferred upon the Federal government.

A PATENT IS A CONTRACT.

The Constitution of the United States, Section 10, Article 1, says:

> No State shall . . . . pass any . . . . law impairing the obligation of contracts.

A patent is a contract, existing between the inventor on the one hand, and the general public on the other; and is entered into under the Constitution and Laws of the United States. The consideration to the inventor is a temporary monopoly. The consideration to the public is the clear disclosure of the invention, and its free use when the monopoly —or patent—has expired.

Whitney v. *Emmett*, Baldw., 303; 1 Robb Pat. Cas., 567; Fed. Cas. No. 17,585;

Kendall et. al. v. *Winsor*, 21 How. 322 (16 L. ed. 165.)

The contract in question is of a high character,—being by no less a party than the people of this great nation, acting in their sovereign capacity, who have solemnly granted the rights in question, for a consideration.

A Canadian authority states the matter admirably:

> It is universally admitted in practice, and is certainly undeniable in principle, that the granting of Letters-Patent to inventors is not the creation of an unjust or undesirable monopoly, nor the concession of a privilege by mere gratuitous favor; but a *contract* between the State and the discoverer.
>
> . . . . . .
>
> Invention being recognized as a property, and a ***contract*** having intervened between society and the proprietor for a settlement of rights between them, it follows that unless very serious reasons, deduced from the liberal [literal] interpretation of the terms of the contract, interpose, *the patentee's rights ought to be held as things which are not to be trifled with, as things sacred in fact,* ***confided to the guardianship and to the honor of the State and of the courts.***

Barter v. *Smith*, 2 Exch. Rep. of Canada, 455, at pp. 477-478.

To permit States or municipalities to levy taxes upon these contracts would impair the obligations which have been entered into by the Government, on behalf of the people, with the inventor or his assignee.

Moreover "the power to tax involves the power to destroy."

McCulloch v. *Maryland*, *supra*.

The statutes of the State of Indiana, under which the acts complained of were performed, clearly are in impairment of the obligations of these contracts, and are therefore unconstitutional and void.

The question is: Shall this State statute be permitted to impair the obligation of this contract by imposing additional burdens or obligations not called for by the contract itself, or by the Constitution or the statute of the United States under which the contract was entered into?

The second paragraph, Article VI, of the Constitution says:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Possibly this matter may be lent a new emphasis by putting the inquiry in this form: Are State or County taxing officers, acting under color of State law, to be permitted to nullify (or annex any conditions to) a contract made by the whole people of this great country through their duly chosen and legally authorized representatives?

No Court has ever affirmed the proposition into which appellees' contention resolves itself. It remained for the Attorney-General of the State of Indiana, and other Indiana State taxation officials, to seriously contend for a proposition so absurd.

But no one in this country, however exalted in station or illustrious in character, is above the law. No State official can, in assuming the name of the State, shelter himself behind her sovereign immunity.

Southern Ry. Co. v. *North Carolina Ry. Co.*, 81 Fed. Rep., 595.

While the fact has not much bearing upon the present case, it may be well enough to state that patents are not such monopolies as are opposed to the policy of the law, as is established by the following authorities:

Allen v. *Hunter*, Fed. Cas. No. 225;
Atlantic Works v. *Brady*, 107 U. S., 203;
Stevens v. *Keating*, 2 Webs. Pat. Cas., 181;
WALKER on Patents, Sec. 152, p. 131;
Seymour v. *Osborne*, 11 Wall., 516;
CURTIS' Law of Patents, preliminary observations.

SUMMARY.

Our positions briefly stated, are—

1. That a patent ***can not*** be taxed by a State:

a. Because it is a Federal franchise not subject to State authority.

b. Because to do so would impair a contract. Furthermore, a contract to which the United States is a party.

2. That a patent ***ought not*** to be taxed, because:

a. It has no ascertainable value.

b. It expires in a limited time; after which—actually and potentially—its value is at an end.

c. Meantime its entire value has been measured by its earnings, and has gone into and become a part of the mass of ordinary property, which is taxable, and presumably is taxed.

3. That the capital stock of a corporation, issued for and representing a patent, is to all intents and purposes, the same thing as the patent itself.

4. That to tax such stock would be the same thing as taxing the patents for which it was issued.

5. That the statutes of the State of Indiana requiring the taxation of "patent rights" contravene Federal law, and are therefore void.

6. That the acts of appellees complained of, being based upon a void law, are also void, and without force or authority, and that acts in continuation thereof, or other acts of the same character, should be prohibited and enjoined.

It is respectfully submitted that the decree appealed from should be reversed and the cause remanded with instructions to the lower court to enter a decree in accordance with the prayers of the bill of complaint.

CHESTER BRADFORD,
for Appellant.

INDIANAPOLIS, INDIANA, September 5, 1902.

REPLY TO APPELLEES' BRIEF.

May it please the Court:

On pp. 5 to 13 of their brief appellees have collated their "points and authorities."

Appellant submits the following propositions as completing, explaining, qualifying or overcoming appellees' "points," and showing that the same, and the authorities cited in support thereof, are not to be held to lead to the result contended for by appellees' counsel.

(No. 1.)

Appellant has not a plain adequate legal remedy under the laws of the State of Indiana. The remedy, if any exists, is multiplex and uncertain.

pp. 31–41 *post.*

Irrespective of this, appellant had the right to resort to a Federal Court with its Federal question.

pp. 3–5 *ante*, pp. 61–63 *post.*

(No. 2.)

County Commissioners have no jurisdiction to disturb findings of the State Board of Tax Commissioners. The statutes giving them authority to refund taxes "wrongfully assessed" are a part of the *old* system which has been superseded by the new tax law, which, as appellees say in their brief (p. 60) "*provides* ***in itself*** *a* ***complete*** *and comprehensive system of taxation*"; and which repealed "all laws and parts of laws within the purview" thereof.

pp. 31–35 *post.*

Neither does this old statute provide for *all* taxes, as there are express statutes in respect to the refunding of *city* taxes (appellees' brief p. 32) by action of the City Clerk and Common Council.

pp. 36–38 *post.*

Besides, we had the right to go to the Federal Court with our Federal question, as above stated.

(No. 3.)

If the State's portion should reach the State Treasury it would be irrecoverable, and consequently the injury irreparable. There is no provision for such recovery in the "complete and comprehensive" tax law of Indiana—which has superseded the old tax law.

pp. 32–35 *post.*

Even if this be not so, a multiplicity of suits would result, as well as a multiplicity of proceedings not suits.

pp. 36–38 *post.*

Suits would not secure the return of the money. Legislative action, by the General Assembly of Indiana, and by the Common Council of Indianapolis, would have to be had.

pp. 36 and 38 *post.*

(No. 4.)

The bill *does* show that the Letters Patent were included in the assessment.

Record, pp. 3 to 15—especially, pp. 13–14.

These allegations are clear, comprehensive and unmistakable.

The authority of the taxing officers of Indiana does not extend over capital stock invested in or composed of Letters Patent of the United States. (See authorities herein at "No. 7" *post.*)

Brief pp. 60–61 *post.*

(No. 5.)

States, of course, have the power to tax *ordinary taxable property* so long as no discrimination is made, irrespective of how it is used; but they have no power to tax inherently non-taxable property at all.

They may tax the *tangible property* used in interstate commerce, but they can *not* tax the *right* to engage in such commerce.

They may tax a *machine* protected by a patent right, but they can *not* tax *the patent right itself.*

The taxation relating to wills and descents is "to be regarded as imposed, not on the bonds, but on the privilege of acquiring property by will or inheritance".

Plummer v. *Coler*, 178 U. S. at p. 134; 44 L. ed. 1008.

Taxation of "shares" and taxation of "capital stock" have been sharply distinguished by this Court.

pp. 63 *post.*

(No. 6.)

The fact that Letters Patent **"is a property that** may be sold, assigned, transferred by gift, sale, devise or judicial process and **under the provisions of the law of Indiana is taxable",** as is here stated by appellees' counsel, is precisely the occasion of this controversy.

These "provisions of the law of Indiana" are utterly and hopelessly unconstitutional, invalid and void; and any taxation thereunder is also utterly and hopelessly invalid and void.

(No. 7.)

If this particular capital stock which is invested in or consists of Letters Patent of the United States "is taxable under the laws of the State of Indiana" as here stated by appellees' counsel, then such laws are also utterly and hopelessly unconstitutional, invalid and void, under the repeated decisions of this Court.

Weston v. *Charleston*, 2 Pet. 449;

People v. *Commissioners of N. Y.*, 2 Black, 620 (17 L. ed. 451);

People v. *Commissioners of N. Y.*, 2 Wall. 200 (17 L. ed. 793);

People v. *Hoffman*, 7 Wall. 16 (19 L. ed. 57);

First National Bank v. *Kentucky*, 9 Wall. 353 (19 L. ed. 701).

pp. 82–84 *post.*

WAS THERE A REMEDY AT LAW.

Taxation within the State of Indiana is made under and by virtue of the provisions of an act of the General Assembly of the State of Indiana, "concerning taxation," approved March 6, 1891, and consisting of 260 sections, of which the 1st and 259th read as follows:

> SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That all taxes for the support of the government of this State shall be assessed on polls and on property listed and valued in an equal and ratable proportion (except such stocks and other prop-

erty as may be specifically taxed) in the following manner, namely: The amount necessary and proper to be charged on each poll and on each hundred dollars' worth of property, for State expenditures and for school purposes, shall, from time to time, be fixed by law; and the amount to be charged on each poll and on each one hundred dollars' worth of property, for county expenditures shall be determined by the Board of County Commissioners at their annual meeting in September.

SEC. 259. All laws and parts of laws within the purview of this act, including "An act to render uniform the assessments of personal property in the several townships of the different counties," approved March 8, 1889, are hereby repealed.

It is from this act that the liberal quotations in appellees' brief are made.

This act was passed by the General Assembly of the State of Indiana, after an elaborate consideration of the entire subject of taxation, and was meant to be a complete substitute for all theretofore existing statutory law upon the subject.

This law, it may be said, retained, copied and re-enacted much of the preceding statutory law; and it is clear that all preceding statutory law which was meant to be retained was thus retained.

That it was meant to supersede all preceding statutory law is clearly evidenced by the broad and comprehensive language of the repealing section above quoted.

The usual formula for a repealing section in the State of Indiana is this:

> "All laws, or parts of laws, in conflict with the provisions of this act, are hereby repealed."

The legislature in the present case were careful to substitute for the words "in conflict with the provisions of this act" the words "within the purview of this act," thus clearly indicating the legislative intent that this act should exclusively comprehend each and every matter within its purview, or in other words, "concerning taxation."

The law to which our attention has been called as a statute under which taxes wrongfully collected may be recovered, is the act of July 24, 1853.

As has been pointed out by appellees in their brief, there was, by the Act of 1891, created a body known as the State Board of Tax Commissioners, consisting of the Governor of the State of Indiana, the Secretary of State, the Auditor of State, and two persons called Commissioners, one appointed from each of the two opposing political parties, and to this Board appeals are to be taken by "any person, partnership, company, association or corporation dissatisfied with" the taxation originally made by the primary taxing authorities, as is fully shown in appellees' brief.

Now, is it supposable for a moment that it was the legislative intent, after creating this elaborate system of taxation and creating this appeal Board of such great dignity and composed of persons of such high authority, that thereafter any one of the ninety-two Boards of County Commissioners throughout the State of Indiana should have the power and authority to override or nullify the action of such a tribunal established by a law enacted nearly twenty years later than the law in question, and wherein the powers and duties on appeal are so elaborately and carefully prescribed?

But fortunately we are not left in doubt upon this proposition, nor are we required to ask this Court to originally decide the question.

Appellees have called attention to the rule laid down by this Court in *Adams Express Co.* v. *Ohio*, *165 U. S. 219*, that:

> construction by the State courts of last resort of State constitutions and statutes will ordinarily be accepted by this court as controlling,

and we have, in the recent case of *Hart* v. *Smith*, a unanimous decision by the Supreme Court of Indiana, not yet officially reported, but found in 64 N. E. Rep., pp. 661–667, a sufficient ruling to show the views of the Indiana Supreme Court upon this question.

In that case, after stating a proposition, the Supreme Court of Indiana say:

> But whether they had or no is a question of fact that the State Board—a body having quasi judicial powers—was required to determine; and if, without

fraud, that body has determined that such shares had a value, then this court has **no power to review** such conclusion.

Citing authorities.

"The determination of the value to be fixed on property liable to be assessed is not, in the absence of fraud, subject to the supervision of the judicial department of the State" . . . . . the Board . . . . "had jurisdiction to commit the error"; and its determination, however erroneous, cannot be impugned collaterally. Jurisdiction existing, any order or judgment is conclusive in respect of its own validity in a dispute concerning any right or title to be derived through, or anything done by virtue of, its authority.

In this same decision, further along, the Court makes this interesting statement:

Although such board is composed of men who, for the most part, otherwise occupy high official station, and although such board performs duties of very great importance to the State, yet such tribunal is nevertheless one of granted powers; and, if it acts without jurisdiction, the courts have the power to arrest the consequences of its acts.

Further along, quoting from *Senour* v. *Ruth*, 140 Ind., 318, the Court says:

"When we have found that the property was not within the jurisdiction of the State, we have found the absence of an element necessary to the validity of the board's action, and in such case the action is void, and may be attacked collaterally." The proposition that a court of equity will enjoin when there is *no jurisdiction*, finds support in the authorities without this State.

Citing numerous authorities.

Further along the Court, continuing the discussion, say:

We think that in a case of this kind it is not proper to apply the rule that obtains when a judgment is collaterally attacked,—that the infirmity must appear on the face of the record. These proceedings are summary, and, to a large extent, informal, and there are no pleadings that tend to make the question decided certain.

Now we come back to our original contention—that these State taxing officers had *no jurisdiction* of the matter here involved—viz., the taxation of patent rights.

It was, therefore, proper to proceed to enjoin these individuals from attempting to enforce such an assessment.

Appellant's proceedings, we contend, were right and regular under the circumstances, and that the conditions and circumstances of the cases cited by appellees render them wholly inapplicable as authorities upon the vital point herein presented.

We are relieved, we think, from any need of discussion of the Indiana Act of 1853, under which the case of *DuBois* v. *Board* was brought and decided. We think it was clearly repealed by the general taxation act of 1891. It must be considered so repealed by the Supreme Court of Indiana, else it would not, in the recently decided case of *Hart* v. *Smith*, *supra*, have declared in respect to a matter upon which the State Board has passed, **"this court has no power to review such conclusion."**

If we could go before the County Commissioners with a claim after the State Board had passed upon it, then inevitably we could also go to the Circuit Court of Marion County, and thence to the Appellate or Supreme Court of the State, according to the amount involved. Therefore, if the Supreme Court "has no power to *review*" the decisions of the State Board of Tax Commissioners, then the County Commissioners have *no power to* ***begin*** a course of proceedings which must inevitably at its conclusion come to a tribunal which has declared that it "has no power to review."

The foregoing seems conclusive. Further discussion of this branch of the case is therefore probably unnecessary. However, even supposing the 1853 statute to be still in force, appellees' contention founded thereon seems nevertheless to be unsound, for reasons which will presently appear.

The quotations from the Indiana tax law which are given near the beginning of appellees' brief present to the Court, in a general way, the procedure followed by the taxing officers in the State of Indiana.

Under the head "Refunding of Taxes," however, the quotations are not quite complete enough to present an adequate view of the procedure under the Indiana statutes. The method of procedure against the State after money has been paid into the State Treasury, is correctly quoted (page 31), but the character of the judgment, and the means of realizing on it, which appellees have not shown, are laid down in the following section:

> **Execution, non-issue of—judgment bear interest. 6.**—Whenever by final decree or judgment of said Superior Court of Marion County, Indiana, or the Supreme Court, a sum of money is adjudged to be due any person from the State of Indiana, *no execution* shall issue thereon, but said judgment shall draw interest at the rate of 6 per cent. per annum from the date of the adjournment of the next ensuing session of the General Assembly until an appropriation shall have been made by law for the payment of the same, and said judgment paid.

The procedure which has been suggested to us, as the plain, simple, complete and adequate remedy at law, therefore includes, if all these Indiana statutes are to be followed, the following steps:

(1). An appeal from the Marion County Board of Review to the State Board of Tax Commissioners.

As by far the larger part of the taxes complained of were ordered to be levied by this same State Board of Tax Commissioners, after hearings on appeals taken (or procured to be taken) by appellees' counsel, it is difficult to see what benefit could have been secured by appealing in the other years. The law does not require an obviously useless and futile thing to be done. Even tender of performance is unnecessary when it is reasonably certain that the offer will be refused.

Hills et al. v. *National Albany Exchange Bank*, 105 U. S. 319; 26 L. ed. 1052.

The City of Indianapolis v. *Vajen*, 111 Ind. 245.

(2). That afterwards we should have paid the demand and filed a petition with the Board of County Commissioners for Marion County for an order to refund the illegal taxes.

Just what hope there would be of securing such an order, after the question had been thrashed out, as it had been, before the Marion County Board of Review, and before the State Board of Tax Commissioners, in proceedings in which the Attorney General of the State, as well as the County Attorney, had participated, it is a little difficult to state.

(3). That upon the denial of the petition of the Board of County Commissioners we should have commenced a proceeding in the Circuit Court of Marion County.

It may be conceded that if we had taken the course suggested and reached this point, we should (if the statute of 1853 is yet in force) have had a trial in a court, and we know of no particular reason why, in such a trial, we should anticipate defeat. Nevertheless, the questions are such as should, and probably would, have been finally brought to this Court; and the advantage of our procedure is that we have come direct. If the 1853 statute is invalid, as we think, then no effective trial could be had at all.

(4.) From the Circuit Court of Marion County it appears we should have by the next step gone to the Appellate Court (or Court of Appeals) for Indiana, as (if the case of *DuBois* v. *Board* is a precedent) this seems to be within the class of cases which have gone to that Court. Probably, however, the questions presented would enable this to be taken to the Supreme Court of the State of Indiana; and it would seem to be necessary to have a ruling upon the question by that Court before coming here, as writs of error, under Sec. 709 Revised Statutes, seem only to be obtainable in the case of "a final judgment or decree in any suit in the *highest* court of a State."

(5.) Thence we could have come by appropriate proceedings to this Court.

(6.) We also, under the statutes which have been quoted, would, as we think, have been obliged to bring a suit in the Superior Court of Marion County, sitting as a court of claims.

(7.) If successful there, we should have had to await a *legislative* appropriation. In other words, the enactment of a *new* law. If not successful, then a course of appeals, similar to that provided for from the Circuit Court of Marion

County in the proceeding instituted after action by the Board of County Commissioners, would seem to have been necessary, if judgments in such cases are appealable at all.

(8.) Then, as pointed out by appellees in their brief, for the city's portion of the taxes we should have had to go to the *common council of the City of Indianapolis.* It is not suggested by appellees how, if the common council of the city should fail to recognize and allow the claim, we should proceed to recover the portion paid the city, which (it may be remarked) is by far the larger portion. It is obvious, however, that a suit would be necessary, and a series of appeals, running from the trial court to this court.

It seems to appellant that this makes clearly manifest the troublesome character of the proceedings to which appellant would have been subjected by any other course than that which has been pursued.

Applying the rule with the greatest strictness, therefore, appellant says that it is abundantly shown that the *multiplicity*, *complexity* and *circuity* of litigation which would result from following any other course than that which has been pursued, fully justifies that course, and fully warranted appellant in proceeding in equity instead of at law, no proceeding at law being cognizable in a United States Court.

This independent of the reasons (perhaps sufficiently set forth in the original brief) based upon appellant's right, as it claims, to have its Federal question tried in a Federal court.

The authority on which appellees most rely seems to be the case of *DuBois* v. *Board*, 10 Ind. App. 347.

Now (it may be well at this juncture to remark) court opinions are authority in circumstances identical with those upon which such opinions are based. Such an opinion rests upon the facts of the particular case and can not be applied to all cases promiscuously.

The facts in *DuBois* v. *Board* were that DuBois had, for a series of years (from 1881 to 1889), returned his credits for taxation and had placed his estimate of values upon such credits. This estimate of valuation had been accepted by the Assessor of Lake County, Indiana, and DuBois had paid his taxes in full upon that assessment and valuation. In 1889

the Board of Commissioners of Lake County made a contract with an individual called "Fant the Ferret" to *discover* omitted taxes, on a basis of twenty-five per cent. of the amounts. Fant "discovered" that it appeared by the mortgage records of Lake County that DuBois held mortgages against sundry parties during all the years in question whose *face values* were greater than the valuation returned for taxation. Thereupon the balance of value between the amounts returned and the face of these mortgages was assessed as "omitted" taxes. There was no evidence showing that these mortgages were in fact worth any more than they had been assessed at. Irrespective of this, however, the court held that the assessment having once been made by lawful authority upon the particular property in question, there thereafter existed no right on the part of anybody to make a different assessment upon that property; and that to attempt to list a *difference* between the one valuation and the other, as omitted property, was to attempt to do by indirection what could not be done directly. A more flagrant case of attempted injustice on the part of a "tax ferret" working on a percentage probably does not appear in the books. This case was before the Appellate Court twice. The original report is in 4 Ind. App. 376. There was a companion case which was heard at the same time and in which the principal opinion was rendered. In this case, *Donch* v. *Board*, 4 Ind. App. 374, the Court said:

> When the amount which shall be paid for the support of Government because of the ownership of particular property has been fixed by a method prescribed by law, that must be regarded as the amount demanded by the law, and it cannot be considered as otherwise than unjust and wrongful for an officer without authority in the premises to assume to change the requirement of the law and thereupon to collect a larger amount. The excess so exacted is property taken to which the Government never was entitled in contemplation of the law.

Now, this was a case clearly "wrongful" and so within the statute in question, and the procedure was probably proper. It was a case of "wrongful" taxation. We say our case does not come within this statute, for reasons which will presently appear. (pp. 40–41, *post*.)

It is an "elementary proposition that one who relies upon a statute for a right of action must make a case distinctly within its terms."

Board v. *Senn*, 117 Ind. 412;
Durham v. *Board*, 95 Ind. 183.

So he who asserts that a statute gives a remedy precluding the opposite party from resorting to a court of equity must make out that the case if so brought would be clearly within its terms.

Board, etc. v. *Armstrong*, 91 Ind. 528, was a case under the very section 5814 on which appellees rely, and under which the suits in *DuBois* v. *Board* and *Donch* v. *Board* were brought; and therein the Supreme Court of Indiana has defined and interpreted said section of the statutes. The Indiana Supreme Court said:

> Webster defines *wrongfully* as meaning: "In a wrong manner; unjustly; in a manner contrary to the moral law, or to justice." *Unlawfully* is not the full equivalent of *wrongfully*. A thing may be unlawful without being contrary to good morals, or to natural justice. *Wrong* is the opposite to *right*, whether considered with reference to strict law or the principles of equity. The word "wrongful," therefore, has a much broader and stronger meaning than the word "unlawful."
>
> The plain inference appears to us to be that a tax may be *irregularly* and even *unlawfully* assessed without inflicting a *moral wrong* or an injustice upon the owner or holder of the property upon which the tax is charged.

The italics are the Court's.

Now, this definition would seem to exclude parties from the benefit of this law except in cases where the collection of the unlawful tax involved a moral wrong. Appellant has never charged appellees with *moral* wrong in this matter, nor has it supposed they would assume the attitude of being *morally* wrong in order, by a technicality, to win their case. They acted (appellant has always assumed) in good faith under the requirement of a statute of the State of Indiana, which, if valid, they are bound to obey, and concerning the validity of which they are not expected to pass judgment.

Courts, and not taxing boards, are created for the purpose of interpreting and expounding constitutions and statutes. Any other tribunal may, of course, assume that a statute is unconstitutional, but if so, it is at their risk and peril.

It cannot possibly be the legal presumption that it was the right or duty of an administrative or executive officer to "at his peril" determine that the statutes of the State of Indiana were unconstitutional. In *Huntington* v. *Worthen*, 120 U. S. 97 (30 L. ed. 588), it appears that a tax collector had ruled that a certain statute was unconstitutional. This Court, having found the statute actually unconstitutional, did not disturb the work of the tax collector based upon his ruling. But so far from determining that it had been his *duty* to so find, it said:

> It may not be a wise thing, as a rule, for subordinate executive or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it if in their judgment it is invalid. This may be a hazardous proceeding to themselves, and productive of great inconvenience to the public; but still the determination of the judicial tribunals can alone settle the legality of their action.

In other words, this Court in this instance excused what, "as a rule," it declared not wise.

VALUE IMMATERIAL IF PROPERTY NON-TAXABLE.

Now we are criticised because the tax returns have not been made to show the value of these patents. It is attempted to be argued that in the absence of a showing that the patents were worth as much or more than the large sums assessed against this corporation that therefore it must be that the taxation was upon other things. And it is attempted to argue also that because the first returns which were made in the early days of the company, before any profit whatever had been made in the conduct of its business, showed the four patents then returned to be worth only $25,000, that that is the entire value of the patents throughout all the succeeding years, notwithstanding the express declination of appellant to in those years return its patents at all or place

any value whatever upon them. Now it may be said that in the earlier returns, the officers of the company, acting without legal advice, and in ignorance of their legal rights, did return their patents at that time at the sum of $25,000; and the taxation at that time—viz., $36,000—was subsequently the value of the tangible property added to this valuation of the patents. But subsequently, when the operations of the company had become extended, and more patents had been acquired, they took legal advice, and thereafter, acting as they believed within their rights, declined to return the patents at all or to place any value upon them. It is immaterial, as we hold, whether the patents are worth one dollar; one thousand dollars; twenty-five thousand dollars; one hundred thousand dollars; one million dollars, or ten million dollars. They have no *taxable* value at all.

Appellees have cited the case of *Central Pacific R. Co. v. State of California*, 162 U. S. 91 (40 L. ed. 903.) We call attention to the following language from p. 114:

> It is said that plaintiff in error should not be bound by this statement because it was on printed blanks prepared by the board, but when plaintiff in error filled out and swore to the statement of its property "as being subject to taxation," and the blank form called on plaintiff in error to give a statement of the value of its franchise within the State for the purpose of assessment and taxation, if it had intended to claim that its State and Federal franchises were so merged as to render the former not subject to taxation, or that it had no franchise subject to taxation, it was its duty to so indicate in making the return. Nothing in the law and nothing in the blank form could have compelled it to make a statement contrary to the facts.

As we intended to claim that these patents were not subject to taxation, we believed it to be our duty to so indicate in making the return. That we were right in this course seems to be conclusively established by this authority. The patents may be conceded to be of even greater value than the assessment which was placed upon them; but if patents are not taxable, this is immaterial, and moreover it was a matter

into which the taxing officers had no right to inquire. In short, it was none of their business.

That portion of appellees' brief (pages 5–6), therefore, where it is attempted to confuse the issue by comments upon the fact that the difference between the value ($25,000) returned for the patents owned by the company in 1893, and the value ($500,000) assessed upon the patents owned by the company in 1898 by the State Board of Tax Commissioners, is utterly fallacious. The bill shows (and its allegations, it must be remembered, are true, at least for the purposes of this case) that there is *no* "combination of money . . . . skill, energy and experience . . . and . other things" to "make up the value of the stock," but that the stock consisted **solely** of the Letters Patent of the United States. The facts of the record are not to be overcome by the wholly foundationless assertions of counsel.

"EO NOMINE."

At page 83 of their brief appellees say:

> Assuming, for the purpose of argument, that patents are not taxable, *eo nomine*, yet that would not preclude the state from taxing the stock of a purely domestic manufacturing company. This is one of the conditions upon which it came into existence.

This reference to patents "*eo nomine*" seems to indicate that in appellees' estimation there are some distinctions to be drawn by varying nomenclature. "A rose by any other name would smell as sweet," and we have no apprehensions that this Court will indulge in any such hair-splitting distinctions. We are entitled, we think, both from the high character of the Court, and from the lessons to be drawn from many of its written opinions, to consider that substance and not mere verbal form is chiefly regarded, and that justice is not to be defeated by a change of appellation.

COMPLIANCE WITH INCORPORATION ACT.

In the continuation of their argument beginning with "To illustrate" (p. 84), there are several fallacies:

In the present case the record does not show any combination of capital and energies in appellant's business except in so far as the patents may be called capital. There is no

pretense here that appellant did not comply with all the terms of the incorporation act, or that the persons incorporated did not pay the regular charter or incorporation fee or tax. There is no pretense that they did not deliver to the assessor each year all statements and schedules required by the law, except that they declined to return their non-taxable patents for taxation; which is the very question here. There is no pretense that appellant did not pay all taxes demanded, saving and excepting the taxes levied on its capital stock, composed of patents.

Now in accepting the terms of the State of Indiana, acceptance was made of valid and lawful terms. No acceptance could possibly be held to have been made of unlawful and invalid terms. Appellant cannot be bound to submit to taxation of its patents because of the unconstitutional and void statute of the State of Indiana requiring the taxation of patents. Appellant and its stockholders have complied with and abide by the Indiana law, so far as the same is valid. Having accepted the benefits of the incorporation act, they *have* paid the consideration in good faith and to the uttermost farthing.

We do not permit appellees to go farther than we do in the sustaining of lawful authority, and we admit and accept, fully and unreservedly, the manner and method of taxation of our property, so far as the same is *lawfully* taxable at all.

But we must insist that appellees' statement falls short of a correct statement of the law, in this vital and essential particular. They should add, as we add, to all these conditions:

> *Subject, nevertheless, to the conditions that we are subject to pay taxes only on* ***lawfully*** *taxable property, and must submit only to the* ***valid*** *laws of the State.*

It is well to remember that the law of Indiana requiring the taxation of patent rights relates to all parties indiscriminately—persons, firms and corporations alike—and is not a special condition made a prerequisite to the granting of a corporate charter.

VALUE OF APPELLANT'S STOCK.

We also contend, as elsewhere more fully stated, that the present value of the stock, market or otherwise, can have no

possible bearing upon the questions at issue in this case. The corporation issued this stock for certain Letters Patent of the United States; and it is therefore a *representative* of these Letters Patent; and when it passes from hand to hand, and money or other property is exchanged therefor, the taxables are neither increased nor diminished, but are merely transferred from one person to another, while that other person transfers to the first simply his interest in the patents represented by the stock. Such a transfer does not affect the corporation in any way. The tangible property so exchanged or transferred is still subject to taxation to the same extent it previously was. And the stock has not lost its representative character.

There is also good *reason*, as well as good law, in support of our contention. To illustrate: A has a patent. B has $100,000. The patent is not taxable. The $100,000 is taxable. B buys A's patent and pays him the $100,000 for it. *A* now has the $100,000 and it is taxable to *him*. B forms a corporation and puts in his $100,000 patent, taking stock therefor. There is yet but $100,000. It has *not* become $200,000 because a corporation has been formed and certificates of stock have been issued. The money has not been multiplied by the change of hands. Neither B nor the corporation has it or any tangible property to represent it, and this being so, neither of them can be taxed upon this value. But the taxing power has lost nothing. The $100,000 still exists *in the hands of A*, and is still taxable at the *same rate* and to the *same extent* as originally. The patent, presumably, of course, has a value, but that value consists wholly in the franchise or monopoly which has been granted by the Government of the United States. The presumption may or may not be correct. If it should turn out *not* to be correct, then, under the theory of appellants, the purchasers would not only lose the $100,000 which they had paid for this supposedly valuable but really worthless thing, but would also be continually taxed because they had done so. If the presumption should be correct, however, this value would soon begin to manifest itself in the form of tangible property (growing out of profits upon the business conducted under the franchise, or monopoly), and this tangible

property so resulting *would* be taxable and in this way the patent—the privilege—the monopoly—the franchise—although not itself taxable, still is the means of producing taxables. These taxables so produced must represent the full actual value of the patent. It is impossible—for the reason, among others, that its life is limited (sometimes by adverse court decisions to a very short period)—that a patent should be worth any more than the money or other property that actually results from its use, which property, as soon as produced, enters into the body of taxables and thus it contributes its full share to the support of the government. To tax it in any other manner, or to any greater extent, would be unreasonable and unjust, as well as unlawful.

When the corporation paid $100,000 for the patent, the officers doubtless thought or believed that they would make at least that much from it. Nevertheless, the corporation did not have one dollar of actual tangible value in hand because of that belief. And to tax them upon that amount, as though they had the money in hand, is an absurdity, as well as illegal. If *beliefs* are to be taxed, why not tax him whose mental processes have been disturbed and whose hallucination, in strange contrast to his surroundings, is that he is worth $1,000,000 upon that amount?

I repeat: A patent is not tangible property, or taxable; its value cannot be determined in advance; and it is or may be valuable, or not, as it is, or is not, profitably operated. Furthermore, if a patent proves profitable in operation the proceeds are taxed the same as other property, and bear their full share of the public burdens. And again, the actual value of a patent cannot exceed the amount which is realized from its exploitation during its lifetime. In and of itself it has and can have no value whatever. Any valuation of it is mere guess work—bald speculation.

TAXABILITY OF PATENTS.

People, etc. v. *Campbell*, 138 N. Y. 543.—Is a case much relied upon by appellees. It is to be regretted that they did not quote from it more fully. We will supply some of the deficiencies:

The *official reporter's* summary of the contention of appellant contains the following:

> The capital stock of the relator invested in Letters Patent of the United States and of *other countries* in North and South America is not liable to taxation here, *except* in so far as the said Letters Patent of the United States *apply to the territory within the State of New York.*

The point of this case, therefore, that patents are not taxable at all, was not made in that case. Courts do not commonly decide points not presented for decision.

The Court (by EARL, J.), near the beginning of the opinion, shows that its understanding of the question to be decided was the same as is appellant's, by saying:

> The relator does not complain that the value placed upon its capital was too high. But *it claims that none of it was employed within the State,* and hence, that none of it could be the basis of taxation under the act, and *whether* ***this claim*** as to the entire capital or any portion of it *is well founded is the* ***sole matter*** *for our determination.*

The New York Court of Appeals did *not*, in *People* v. *Campbell*, pass upon the question now before us, because no such question was there raised to be passed upon.

The case of *Crown Cork & Seal Co.* v. *Maryland*, 87 Md. 687, which is so elaborately quoted from and discussed by appellant's counsel, brief pp. 86–91, is easily to be distinguished from the present case. In that case it appears that the corporation *purchased* patent rights. It does *not* appear that the stock was issued for the patent rights. There is a wide difference between the two cases. In the one case the stock is solely the representative of patents, and nothing else. In the other case, the patents having been purchased *subsequently* with cash, have no necessary direct connection with the stock.

In the *Crown Cork & Seal Co.* case, also, appellee submits, with all due respect, that the Court's opinion contains much that is unsound, both in law and in logic. Its remarks, so far as they bear directly upon the questions presented here, are also largely in the nature of *obiter dicta*.

The Court (at p. 698) itself says:

> It will remain *for future consideration* whether a patent right may not of itself be a proper subject of taxation, but that as just stated is *not* a question necessary to be decided on this appeal.

Distinguishing further, it appears, by the opinion of the Court (at p 696), that in Maryland—

> the tax is *not* a tax upon the stock or upon the corporation, but upon the owners of the *shares* of stock, though the officers of the corporation are made the agents of the State for the collection of the State tax.

For the distinction between "capital stock" and "shares," see *Owensboro National Bank* v. *Owensboro*, *post* (p. 63).

The Court further declares (at p. 700) that the rule in Pennsylvania that "the tax being upon the capital stock, it is a tax upon the company's property and assets," is "not the law of Maryland."

It is difficult to see, therefore, even conceding the conclusion of the Court under the law of Maryland to be sound, (which we are by no means prepared to do), how that case can be regarded as much of an authority here, where the law of the State is very different from what the law of Maryland is declared to be.

Another difficulty is that a patent is not within the jurisdiction of any State:

The late Justice GRAY, when C. J. of Mass., said:

> A patent right is not within this Commonwealth, by reason of the owners residing and being found here, in any other sense than his interest in any debt or right of action owned by him.
>
> *Carver* v. *Peck*, 131 Mass. 291.

> These incorporeal rights [patent rights and copyrights] do not exist in any particular State or district; they are co-extensive with the United States. There is nothing in any Act of Congress, or in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of States and districts.
>
> *Stevens* v. *Gladding*, 58 U. S. 447; 15 L. ed. 155.

NEW JERSEY FRANCHISE TAXES.

Storage Battery Co. v. *Board of Assessors*, 60 N. J. L. 66. —In this case, as in *People* v. *Campbell*, there was no such

contention made as in the case at bar. The Court, at p. 68, says:

> The contention is that the company is wholly exempt from taxation by force of the proviso in Section 4 of the Act of 1892. Gen. Stat., p. 3337, Section 260.

The statute in question provides that corporations "shall pay an annual license fee or franchise tax of one-tenth of one per centum on all amounts of capital stock issued and outstanding," etc., and the *proviso* in question reads, in part, as follows:

> *Provided*, that this act shall not apply to . . . . . manufacturing or mining corporations, at least 50 per centum of whose capital stock issued and outstanding is invested in mining or manufacturing carried on within this State.

Marsden Company v. *Assessors* and *Honduras Company* v. *Assessor* are exactly similar cases. The quotation from these cases at page 92 of appellees' brief is all that is necessary to establish our contention in respect to these cases, in which there is this very clear and very broad distinction to be drawn:

In New Jersey the tax upon the capital stock is the tax levied upon the corporation *for the privilege of* ***being*** *a corporation* under the New Jersey laws. Whether the company has any assets at all or not has nothing to do with the case. It is the same as the fee charged in many States, including the State of Indiana, for the privilege of becoming a corporation and maintaining itself as a corporation.

In the quotation given by counsel from the *Storage Battery Company* case (pp. 91–92), this clearly appears by the following language:

> Corporations of the class to which this company belongs are taxable with respect to the capital stock issued and outstanding ***as a fixed factor*** without regard to the purpose for which the capital stock was issued or whether issued for value or not.

In other words, there is no "valuation" of the capital stock involved in this taxation at all. It is in the nature of a *license* or *charter tax* or *fee* and nothing else. It would be hard to imagine conditions more different than those of this case.

In *Marsden Co.* v. *Assessors* it is said:

> The argument for exemption rests upon the false premise that the tax assessed is a property tax.

THE RULE IN PREVIOUS TAX CASES.

Appellees also much rely upon the "Bank Tax Cases" of *Van Allen* v. *Assessors*, 70 U. S. 573.

Undoubtedly these are leading cases, and the decision there reached by a majority of the Court is of great importance and settled important questions of taxation.

But these cases seem to have no application to the case at bar, as the facts are widely different and the statutes involved still more widely different.

The Court in that case, after enumerating the provisions of the Act of Congress under which national banks are established, said:

> Now, these are *very great powers and privileges* conferred by the Act upon these associations, and which are founded upon a **new use** and application of these government bonds, especially the privilege of issuing notes to circulate in the community as money.
>
> . . . . . .
>
> In the granting of chartered rights and privileges by government, especially if of great value to the corporators, certain burdens are usually, if not generally, imposed as conditions of the grant. Accordingly, we find them in this charter. They are very few, but distinctly stated.
>
> They are, *first*, ... and *fourth*, ***a State tax*** upon the shares of the association held by the stockholders, not greater than assessed on other moneyed capital in the State, nor to exceed the rate on shares of stock of State banks.
>
> . . . . . .
>
> The question involved is altogether a different one from that decided in the previous bank cases and stands upon different considerations. The State tax, under this Act of Congress, involves no question as to the pledged faith of the government. **The tax is the condition for the new rights and privileges conferred upon these associations.**

The Court proceeds to point out a distinction between **shares** held by individuals and the **capital stock** of the

corporation, and shows how Congress had provided that the president and cashier of such banks shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders and the number of shares held by each, which list shall be subject to the inspection of shareholders and creditors "and the officers authorized to assess taxes under State authority," etc.

In the present case we find no such conditions. There is no **new use** of Letters Patent specially conferred by Act of Congress upon this corporation. There are no great and extraordinary "powers and privileges" here to be considered. The patents in question are ordinary patents, issued in the ordinary way, with the usual rights and privileges which are granted when patents are issued, and no others. The corporation can make no other or different use of its patents than an individual could. The corporation is organized under the general Indiana law governing the organization of ordinary corporations. There is nothing whatever in that law which prevents it from owning and using patents. There is no reason, in fact, or assigned, why it should not make this ordinary and regular use of its patent privileges. There is no suggestion here that the State of Indiana has ever attempted to restrict its corporations in the matter of ownership or use of patents. In short, the corporation stands before us, in respect to its ownership of patents, precisely as an individual patentee or owner of patents might do. There is no legerdemain involved in the matter. There is no mystery to be solved. Appellant is under no legal disabilities in respect to any question here presented. It has the same rights, as a suitor, that any other person, natural or artificial, might have. And the questions to be decided are not to be decided in view of *special* legislation granting "very great rights and privileges" (such as the privilege of issuing its notes for money), but are to be decided wholly under the *general* legislation governing patent property, under which it stands, and must stand, in the same position as any other owner of patent property.

And the tax here attempted to be assessed is not upon the "*shares*," but upon the "*capital stock*."

In the case of *Owensboro National Bank* v. *City of Owensboro*, *supra*, after citing *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank*, 9 Wheat. 738, and *Davis* v. *Elmira Savings Bank*, 161 U. S. 283 (from the latter of which a quotation is taken), the Court says:

> It follows then necessarily from these conclusions that the respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, were it not for the permissive legislation of Congress.

These bank cases, therefore, are not authority for the contentions of appellants in this case. Congress has not passed any act permitting the taxation of patents, or "patent rights," and it may further be said that obviously these cases constitute no exception to the rule that that which can not be done directly can not be done indirectly, because United States bonds are *always* included in the capital of national banks. The authorization of the act of Congress was complete, and Congress knew when it passed the act that a part of the stock of a national bank *must* (sec. 5159 R. S.) be invested in Government bonds, because a bank can not be a national bank without owning Government bonds—and, therefore, Congress here has directly—as directly as if it in terms had said so—authorized the taxation of bonds so held. There is nothing indirect about it. To authorize a thing to be done which necessarily and inevitably causes another thing to be done, is the same thing as authorizing that other thing to be done,—under all the rules of logic, reason and common sense.

A pertinent authority against the course of suits and appeals which appellees have suggested, is found in the decision of this Court in *Morgan* v. *Beloit*, 7 Wall. 613 (19 L. ed. 203), where the Court said:

> If the Town should be compelled to pay the entire amount, the right is given by the statute to recover back the proportion for which the City is liable. ***This would involve circuity of litigation.*** The remedy at law is, therefore, neither plain nor adequate.

There is another reason why appellant should not pay, and then sue to recover back, which is clearly shown by the following authority:

It is next suggested that since there is a plain, adequate and complete remedy by paying the money under protest and suing at law to recover it back, there can be no equitable jurisdiction of the case.

The reply to that is, that the bank is not in a condition where the remedy is adequate. In paying the money it is acting in a fiduciary capacity as the agent of the stockholders; an agency created by the statute of the State. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank, as a corporation, is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends and subject itself to litigation by doing so, or refuse to obey the laws, and subject itself to suit by the State. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent multiplicity of suits, equity may interfere.

Cummings v. *National Bank of Toledo*, 101 U. S. 153 (25 L. ed. 903.)

In the *State Railroad Tax Cases*, 92 U. S. 575 (23 L. ed. 663), which has been cited by the appellants, we find much which is instructive.

In that case, among other things, the Court says:

> One of the reasons why a Court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State.

This objection does not obtain in the present case, as, whatever the event, no new assessment is to be made. The assessment complained of will stand, or it will be wholly wiped out.

The Court also, in giving reasons why the decrees should be reversed and remanded with directions to dissolve the injunctions, stated:

> There is no violation of the Constitution, either in the statute or in its administration, by the board of equalization. No property is taxed that is not legally

liable to taxation; nor is the rule of uniformity prescribed by the Constitution, violated.

In the present case appellant contends that there has been a violation of the constitution, and that property *has* been taxed that is "not legally liable" to taxation.

Further along the Court observes that it is a profitable thing for corporations to obtain a preliminary injunction as to all their taxes and contest the case for several years, and at the end submit to pay what is found to be due, and states that before a bill can be maintained, what is conceded or appears to be due must be paid. In this case appellee did pay all and more than seems to be due.

It will thus be seen that appellant has scrupulously kept itself within the law as laid down in this case. It seems, therefore, that it is an authority rather in its favor than against it.

In *P., C. C. & St. L. Ry. Co.* v. *Board of Public Works of the State of West Virginia*, 172 U. S. 32, this Court quotes approvingly from the "State Railroad Tax Cases," and thus it may be considered that the decision in the last named case was reached subject to the rule laid down in the former case. It does not appear, at all events, that any Federal questions were presented, such as are inseparably involved in the determination of the case at bar.

In the *State Railroad Tax Cases, supra*, this Court said:

> We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction.

It would seem to us that for numerous reasons given in this brief we have brought this case "within some of the recognized foundations of equitable jurisdiction."

If upon the authority of the *State Railroad Tax Cases* it is urged that we should have paid the State taxes, and confined our suit to the county, city and township taxes, we reply: If we had paid the State taxes, we had no remedy at law for their recovery, because suit in the Superior Court of

Marion County would not have resulted in a judgment which could have been enforced by execution, and until an appropriation was made by the legislature such judgment would be of no avail. This remedy, therefore, is entirely inadequate. Moreover, it was a remedy which could not be resorted to in the Federal courts, to which complainant (by reason of this case presenting a Federal question) had the right to resort to recover money for taxes illegally exacted from it, or, in a proper case, to enjoin their collection. Certainly, we can not be compelled, in the first instance,—where we have a cause of action arising under the Constitution and laws of the United States, and a right to resort for an enforcement of our remedy, whatever it is, to the Federal court,—to resort to any remedy provided by the State statutes which can not be administered in Federal courts, or which would not result in a judgment which would be directly enforced by the Court. If it were otherwise, our right to resort to Federal courts would be taken away by State legislation, and, clearly, no suit at law can be maintained in a Federal court to recover State taxes, because the suit must either be directly against the State, or a State officer representing the State. Prohibition to sue a State equally applies against a State officer, acting for and representing the State.

Therefore (if the statutes are still in force) the statutory remedies suggested,—appealing to the State Board of Tax Commissioners of the State of Indiana, and application to the Board of County Commissioners of Marion County, and application to the Common Council of the City of Indianapolis, for the refunding of taxes illegally collected—do not apply:

1. Because they can not be administered in the Federal court; and if appellant was required to resort to them, it would be deprived of its right to resort to the Federal court.

2. Because they do not result in a judgment which can be enforced by the Court by ordinary processes. They are, therefore, not an adequate legal remedy, such as would prevent equitable relief by injunction in the Federal courts.

3. It is also the established law in the State of Indiana that the collection of an illegal tax can be enjoined notwith-

standing the statutory remedies for the refunding of such taxes when paid.

Hyland, Auditor, et. al. v. *The Brazil Block Coal Company*, 128 Ind., 355, is an authority in point. There the company had made a full return of its taxable property, and the proceeding was to enjoin the collection of a tax levied on its capital stock, which was assessed additionally to the tax on the property. In the course of its opinion the Court, at p. 342, said:

> The plaintiff does not seek to defeat a part of an assessment, but it seeks to prevent the levy of an assessment upon property not subject to taxation. The statute does not, as we have seen, authorize the assessment of the capital stock, and as there is no property subject to taxation, there can be no part of an assessment which the appellee is bound to pay.
>
> As it is made to appear by the complaint that the capital stock did not exceed in value the tangible property returned for taxation, there is no question as to the effect of the finding of the Board of Equalization; for the question is whether the Board can assess property which, by law, is not subject to taxation. If the property—that is, the capital stock—had been subject to taxation, then the question as to whether the value placed upon it by the Board is final and conclusive would be presented, but as the confessed allegations show that the capital stock was not subject to taxation, the Board had no authority over it, since it is clear that the Board cannot make property of any kind subject to assessment when there is no statute conferring that authority upon it.

The foregoing case is closely analogous to that at bar. Here we show, as there, that "there is no property subject to taxation," and the property is, as there, the "capital stock." We say that over this property, under the evidence made as to its character, that "the Board had no authority."

It may be said that there is an Indiana statute authorizing such assessment, but as this Court said in *Allen* v. *B. & O. R. R. Co.*, *ante* (pp. 7–8), "an unconstitutional law will be treated by courts as null and void."

It would seem that a plaintiff who has a right to go into the Federal courts because of diversity of citizenship or of a

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Federal question being involved, should be allowed the remedy of injunction whenever, under the facts stated in his bill, it would be sustained in the State courts, as would seem to be the case in Indiana, under the authority last quoted from.

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proceeding like this, it was necessary to go farther and show that *some fact existed which rendered the action of the board of equalization void.*

standing the statutory remedies for the refunding of such taxes when paid.

Hyland, Auditor, et. al. v. *The Brazil Block Coal Company,*

Injunction is a proper remedy in the courts of Indiana against a **void** tax:

Stockman, Treas., v. *Robbins*, 80 Ind., 195.
Board v. *Murphy*, 100 Ind., 573.
Jones, Treas., v. *Gas Co.*, 135 Ind., 595.
Senour v. *Ruth*, 140 Ind., 318 (see *ante*, p. 34).
Senour v. *Matchett*, 140 Ind., 636.
Hart v. *Smith*, 64 N. E. Rep., 661.

Stockman, Treas., v. *Robbins* was a case where suit was brought to *enjoin* an unlawful assessment. The Indiana Supreme Court, in affirming the decision of the lower court overruling demurrers to the complaint, sustained this as a proper procedure in Indiana. This was in 1881, nearly 30 years after the enactment of the statute of 1853. This case was approved in *Board* v. *Murphy*, 100 Ind., 573, in 1885.

In *Senour* v. *Ruth* it was said:

> "When we have found that the property was not within the jurisdiction of the State, we have found the absence of an element *necessary* to the validity of the board's action, and in such case the action is *void*, and may be attacked collaterally."

This was approvingly quoted in *Hart* v. *Smith*, the latest case in that Court on the subject, and is certainly the established law in Indiana.

See quotation from *Adams Express Co.* v. *Ohio*, p. 33 of appellant's reply brief, and quotations from *Hart* v. *Smith*, pp. 33, 34.

treated by courts as null and void.

It would seem that a plaintiff who has a right to go into the Federal courts because of diversity of citizenship or of a

Federal question being involved, should be allowed the remedy of injunction whenever, under the facts stated in his bill, it would be sustained in the State courts, as would seem to be the case in Indiana, under the authority last quoted from.

The case of *Shelton* v. *Platt*, 139 U. S. 591 (35 L. ed. 273), is to be clearly distinguished from the case at bar in many particulars, which are easily apparent upon an examination of the opinion.

The notable and conspicuous matter, however, to which we desire to especially direct the attention of the Court, is the broadly different statutory condition existing in Tennessee from that which exists in Indiana. The Tennessee Statute, Sections 1 and 2 of the Act of 1873, set out in the statement of the case in *Shelton* v. *Platt*, shows a plain, direct, unitary and simple statutory remedy in *all* cases of unlawful taxation, and which covers *all* such taxes and enables *all* such questions to be determined in a single proceeding.

The statutes of the State of Indiana, quoted in appellees' brief, do not, as those of Tennessee do, afford the single, simple, plain and adequate remedy which is necessary to oust equity of its jurisdiction.

This point will not be argued further, as a mere comparison of the statutes in question, which can conveniently be had from appellees' brief, and the report of *Shelton* v. *Platt* will make it plain. This, independent of our contention that we had in this case the clear right to go to the Federal Court.

In *Jones, Treas.* v. *Gas Co.*, 135 Ind. 595, cited by appellees at p. 28 of their brief, the Indiana Supreme Court, on p. 599, say:

> This case was tried upon the theory that the appellee was entitled to relief if it succeeded in showing that its whole capital was invested in tangible property returned for taxation, and that its capital stock did not, in fact, exceed in value such property. The theory is erroneous. Had this been a trial, on appeal, to a tribunal authorized to correct the assessment, the theory would have been correct, but, in a collateral proceeding like this, it was necessary to go farther and show that *some fact existed which rendered the action of the board of equalization void.*

> *Unless* its action was void, the collection of the tax levied upon its assessment can not be enjoined.

This shows clearly that in Indiana if any fact can be shown on the trial of a suit in equity which renders the taxation *void* the collection of the tax may be enjoined.

The quotation in appellees' brief (p. 24) from *Senour* v. *Matchett* also clearly shows that the Supreme Court of Indiana does not consider that the course of appeals prescribed by the Indiana taxation act must be followed in cases where the taxation is void. Note the language:

> A person aggrieved by reason of the errors or irregularities that may enter into the decisions or orders of the Board of Review, *and which may render the same* ***voidable*** *but not* ***void,*** must invoke the remedy provided by appeal, and will not be permitted to assail the same in a court of equity.

If the law in Indiana, as declared by its Supreme Court, has any bearing upon this case, it establishes (the tax being shown to be void because levied upon "patent rights") that the taxation might properly be enjoined.

The "*Dows Case*," 11 Wall. 108, is cited (appellees' brief, p. 38) upon the point that a bill to restrain the collection of a tax will not lie unless the case is brought within some acknowledged head of equity jurisdiction. Appellant sees no occasion to controvert the legal proposition thus laid down, and calls attention to the fact that this Court cited approvingly in that case *Heywood* v. *Buffalo*, 14 N. Y. 534, to the effect that the rule that a court of equity will not entertain an action by the party aggrieved, for relief against erroneous or illegal assessment, is subject to *three exceptions*, which this Court stated as follows:

> Where the enforcement of the assessment would lead to a *multiplicity of suits*, or where it would produce *irreparable injury*, or **where the assessment on the face of the proceedings was valid, and extrinsic evidence would be required to show its invalidity.** Whenever a case was made by the pleadings falling within *either* of these exceptions, the court said that equity would interfere to arrest the excessive litigation, or prevent the irreparable injury, or remove the cloud upon the title, but would not interfere where none of these circumstances existed.

In this view of the case (which, however, we do not desire to be understood as accepting) the assessment "on the face of the proceedings" seemed to be entirely valid and regular because it was authorized and required by the statutes of the State of Indiana, and by the forms printed in pursuance and in accordance with said statutes. It required "extrinsic evidence to show its invalidity." Until the fact that patents issued under the Constitution and laws of the United States were the sole basis for the stock was made evident, there was nothing, if appellees' contention is correct, to show that the assessment was not a proper one.

Under the authority above cited, therefore, this equitable proceeding is clearly authorized.

In nearly all of the cases cited by appellees' counsel the question of *value* seems to be the leading and controlling one. In this case there is no such question. The real issue is whether or not the Federal law renders the assessment under the Indiana law wholly void.

As was lately well said by the Supreme Court of Texas:

> The wrong did not consist in a failure to follow the directions of the law, but in obeying its unconstitutional requirements.
>
> *Hutcheson* v. *Storrie*, 92 Texas, 685.

INHERENT TAXABILITY AND INHERENT NON-TAXABILITY.

In the consideration of the authorities cited by appellees relating to taxation, this distinction is to be observed, rendering them inapplicable to or modifying their effect upon the present case:

These cases uniformly involve taxation of property *inherently* subject to taxation. Railroads, bridges, moneys, and such like things, obviously ought *always* to be taxed, unless there are special conditions, such as antecedent contractual rights, exempting them.

In the present case, on the contrary, the property is inherently non-taxable. To attempt to place a taxable value upon a patent right is in violation of the rules of common sense and common reason, as well as the paramount law.

We say, therefore, bearing in mind the rule that a decision is authority only in cases where the facts and circum-

stances or the principles involved are the same, that it is not necessary to distinguish these cases in detail; but that, whatever apparent bearing any language found therein may have upon the questions at issue, will be seen to have lost its pertinency, when viewed in the light of the above-stated broad differences which must be held to be present in the subjects-matter. We are dealing here with a new case, different from any which this Court has heretofore been called upon to consider; and while the general principles governing the decision in the case of *McCullough* v. *Maryland*, and similar or analogous cases, are thought to be pertinent and controlling, inasmuch as in those cases the broad right to do something which was granted by Federal law was attempted to be curtailed and hampered by State action, it is equally obvious that these other cases, relating merely to excessive or irregular taxation of property in itself taxable, can have but little or no bearing upon the question which we have endeavored to present to the Court.

WANT OF JURISDICTION OVER NON-TAXABLE PROPERTY.

All the valid statutes providing for the taxation of property must relate to property which the State is not excluded from taxing by the laws of the United States, and cannot relate to property which is not within the jurisdiction of any State Court or tribunal.

If the taxation of patent rights is within the jurisdiction of the taxing authorities of Indiana, these authorities have the right to decide that a patent right *is* taxable, as well as to decide that a patent right is *not* taxable, and (in either case) the decision is not a nullity, but at most only erroneous, and when the remedy—by appeal or other direct steps—to review such decision is exhausted, the result cannot be attacked in any other court, either State or Federal, as such attack would be a collateral one.

It follows, therefore, if appellant has any remedy at all against this illegal taxation of its patent rights, that it must be by a suit against the taxation itself, and presumably in the Federal Court.

This taxation is *in rem* and not *in personem*. The State authorities have no jurisdiction of the property in question.

Supra, p. 48. It is entirely beyond their power. That its owner is a corporation of the State can make no difference. The State has not forbidden its corporations to invest its stock in Letters Patent, or annexed any conditions to its so doing, except that providing for the taxation of patents, to attack the validity of which is the sole purpose of this suit. The corporation has fully complied with all legal requirements of the State.

Again we say, therefore, that the proceeding in the Federal Court was the proper one, and the only proper one; and that any attempt to subject this property to taxation is entirely void, because State tribunals have *no jurisdiction* for taxing such property, or any legal authority in that behalf whatever. If we go into State tribunals, we recognize the authority of such tribunals, which is the very thing we are denying.

> It is the right and duty of the National Government to have its Constitution and laws interpreted and applied by its own judicial tribunals.
>
> *Mayor, etc. of Nashville* v. *Cooper*, 73 U. S. 247; 18 L. ed. 851.

This Court has never in any of the cases which have been before it decided that non-taxable property should be taxed. Indeed, it has taken pains to expressly hold the contrary. In *Adams Express Co.* v. *Ohio* (166 U. S.), cited by appellees in their brief, on the final consideration, on rehearing, this Court, at pp. 222–223, expressly held (citing authorities) that if the company had United States bonds or other property exempt from taxation, and should show the facts, those facts *must be taken into consideration*, saying:

> That if such facts exist they must be taken into consideration by a State in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this Court.

and if a company having such property omitted to show the facts it could not complain at the result. It is sufficient to say that this appellant has always, everywhere, and on all occasions, shown the facts in respect to its property. It has taken pains to make these facts clear and conspicuous. The whole contention is based upon the persistent, repeated and elaborate showing of these particular facts—viz., that its

stock consists of Letters Patent of the United States, and of nothing but Letters Patent of the United States. These facts, therefore, make all such decisions cited by appellees inapplicable as authorities. If applicable at all they sustain appellant's contention, rather than that of appellees.

FEDERAL COURT HAD EQUITABLE COGNIZANCE.

In this case the questions of want of jurisdiction and want of equity are closely related. In other words, if the Federal court had jurisdiction, then it had jurisdiction in equity, because, as has heretofore been shown in the original brief, no remedy at law was possible in that court.

The right of a party to have a Federal question determined in a Federal Court is a right that excludes the jurisdiction (unless the party voluntarily resorts to it) of any State court or tribunal to determine the question, and when he resorts to the Federal Court the question of whether he shall sue on the law or equity side of the court is to be determined solely with reference to the fact as to whether he has an adequate remedy at law in the Federal Court, and excludes consideration of legal remedies which are only available to him in State Courts or tribunals.

Whether appellant had any legal remedy or not in a State Court is therefore immaterial in the present case.

We say the State tribunals had *no jurisdiction* of the subject-matter.

No State authority has, or can have, authority to tax Letters Patent of the United States.

The only effective remedy in the Federal Court was the equitable one sought.

Therefore the Federal Court clearly had equitable cognizance of the case as brought, and should have decided it on its merits.

> The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a

suit in that court; and he **cannot be deprived of that right** by reason of his being allowed to sue at law in a State court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States. [Citations.] But if the case in its essence be one cognizable in

vidual shareholders are two distinct pieces of property.

. . . . . .

This statement has been reiterated many times in various decisions by this Court, and is not now disputed by anyone.

Owensboro National Bank v. *Owensboro*, 173 U. S. 664; 43 L. ed. 850.

This case, it may be said, involved taxation which was "imposed upon the bank and its property or franchise, and not upon the *shares* of stock in the name of the stockholders," and such taxation was by this Court declared to be void and

stock consists of Letters Patent of the United States, and of nothing but Letters Patent of the United States. These facts, therefore, make all such decisions cited by appellees inapplicable as authorities. If applicable at all they sustain appellant's contention, rather than that of appellees.

FEDERAL COURT HAD EQUITABLE COGNIZANCE.

This Court, as lately as 1899, has had two cases before it involving the right to maintain a suit in a United States Circuit Court to enjoin a tax imposed upon property and franchises in violation of Federal law.

In *Third National Bank* v. *Stone, Auditor*, 174 U. S., 432, 434, where the Circuit Court had sustained a demurrer to the bill and dismissed the suit, this Court *reversed* the judgment.

In *Louisville* v. *Third National Bank*, 174 U. S., 435, where the Circuit Court awarded a decree restraining the collection of such taxes, this Court *affirmed* the judgment.

These decisions were both upon the express ground that the taxes sought to be enjoined were imposed by the Kentucky taxing officers upon the franchises and property of the bank in violation of the Act of Congress.

The judgments in these cases seem to be a conclusive answer to appellees' contention that no such suit in equity as this can be maintained.

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Therefore the Federal Court clearly had equitable cognizance of the case as brought, and should have decided it on its merits.

> The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a

suit in that court; and he **cannot be deprived of that right** by reason of his being allowed to sue at law in a State court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States. [Citations.] But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. [Citations.] A party by going into a national court does not, this Court has said, lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality; that the wise policy of the Constitution gives him a *choice* of tribunals. [Citations.]

Smith v. *Ames*, 169 U. S. 466; 42 L. ed. 819.

CAPITAL STOCK—NOT SHARES—WAS ASSESSED.

The taxation here complained of is upon *the capital stock of the corporation*, as distinguished from the *shares of stock* into which it is divided.

The quotations from the Indiana tax act of 1891, found in appellees' brief, all show that this is the method of taxation of corporate capital in Indiana. The capital stock is shown to consist of patent rights. The distinction between capital stock and shares of stock has been clearly defined by this Court.

> The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property.
>
> . . . . . .
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> This statement has been reiterated many times in various decisions by this Court, and is not now disputed by anyone.
>
> *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664; 43 L. ed. 850.

This case, it may be said, involved taxation which was "imposed upon the bank and its property or franchise, and not upon the *shares* of stock in the name of the stockholders," and such taxation was by this Court declared to be void and

the decree of the court below sustaining such taxation was therefore reversed.

USELESSNESS OF APPEAL TO STATE BOARD.

Appellees also call attention to the fact that appeals were not taken from the Marion County Board of Review to the State Board of Tax Commissioners; and it is insisted that this is a fatal omission. It is sufficient, we think, in reply to say that by far the greater portion of the taxes complained of were fixed by this same State Board of Tax Commissioners on appeals taken (and procured to be taken) by counsel for appellees, as fully appears in the record. We, therefore, have before the Court not only the presumption that the State Board of Tax Commissioners would have followed the Indiana statute and, like the Marion County Board of Review, taxed appellant's patents, but it also appears that this identical Board of Tax Commissioners actually did this very thing.

We may also say that in our view these taxing officers *must*, under the Indiana statutes, have taken the "patent rights" directly into consideration in performing their duties. The statutes governing them have already been referred to and quoted from, both in the bill (p. 3) and in our brief (p. 8). When it is alleged that these taxing officers did *not* take the patents into consideration, the Court is asked to believe that they *disobeyed* the law which created them and *refused to perform duties clearly laid down in the statutes of the State of Indiana which govern them*. They would have us believe that they are a tribunal to which constitutional questions are delegated for decision, and that they had declared the statutes of the State of Indiana in this particular unconstitutional and had proceeded to assess the property which they had decided to be constitutionally and lawfully assessable, and had omitted to assess certain other property which the statute and statutory form require them to assess.

Such an assumption needs only to be stated to show its untenability. Taxing officers must necessarily follow the statutes under which they act until such statutes are declared invalid or inoperative by competent authority. If they say they have not, that is tantamount to saying that all their acts are absolutely void, as being without authority of any kind.

If they acted lawfully as taxing officers, then they acted *under* the statutes enacted for their guidance—not in *defiance* of them. If they did not act under the statutes of the State of Indiana by which these boards were established and by which they must be governed, they were mere assemblages of private citizens, without any authority whatever in the premises. That some or all of the provisions of these statutes may in proper proceeding be found to be unconstitutional and void, in no way avoids the duty of such officers as these to obey and act under them while they appear to be in force. The record shows that this Board did actually obey the unconstitutional act complained of.

WHAT "FRANCHISES" ARE TAXABLE.

We are shown by appellees in their brief (pp. 13–21), by means of quotations from the statutes of the State of Indiana, that all property and franchises "owned" by corporations or by individuals should be taxed. This must necessarily mean that all property and franchises "owned" by corporations or individuals which are *lawfully taxable* should be taxed. It cannot mean that property or franchises owned by either corporations or individuals which are not lawfully taxable should be taxed.

Neither can it mean to include in the term "franchises . . . owned" the charter of the corporation itself. These charters are for sale, by the State of Indiana, for a fixed and definite sum, and can be secured, any day, by any three or more persons, for the price prescribed, and in the manner provided, in the following sections of the statute:

> *Act in force August 24, 1875.* **How incorporated.** 1. Whenever three or more persons may desire to form a company to carry on any kind of manufacturing, mining, mechanical, or chemical business, or to furnish motive power to carry on such business; or to supply any city or village with water; or to form union stock yards and transit companies, and operating, maintaining, and transacting the business incident to such companies; or to form grain elevator companies, and constructing, maintaining, and operating elevators, and transacting the business incident thereto; or to form companies for the purpose of buying and selling dry goods, carpets, boots and shoes,

millinery goods, fancy goods, or jewelry, in connection with the manufacture of such goods, and articles, into any articles for which they are suitable, and for the sale of such articles, when they are so manufactured—they shall make, sign and acknowledge, before some officer capable to take acknowledgment of deeds, a certificate, in writing, which shall state the corporate name adopted by the company, the object of its formation, the amount of capital stock, the term of its existence (not, however, to exceed fifty years), the number of directors and their names who shall manage the affairs of such company for the first year, and the name of the town and county in which its operations are to be carried on, and file the same in the office of the Recorder of such county, which shall be placed upon the record, and a duplicate thereof in the office of the Secretary of State.

Act in force May 6, 1853. **When incorporated.** 2. When the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowled the same, and their successors, shall be a body politic and corporate, and, by their corporate name, may take, hold, and convey real estate necessary to carry on the operations named in such certificates.

Act in force March 4, 1891. **Fees-Corporations.** SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That the Secretary of State shall hereafter charge and collect, for the benefit of the State, the following fees, viz:

First. For filing with such Secretary of State the articles of incorporation, or a certified copy or duplicate thereof, of any corporation whose capital stock is ten thousand dollars or under, ten dollars. Of a corporation whose capital stock is over ten thousand dollars, one-tenth of one per cent. upon the authorized capital stock of such association.

. . . . . .

SEC. 2. All the fees in this act provided for shall be paid into the State Treasury, and shall be in addition to any fees that are now allowed by law to the Secretary of State for personal services for filing any of the papers herein mentioned. And such Secretary of State shall neither file nor record any of the articles of incorporation, certificates, duplicates or other papers hereinbefore mentioned, unless all the fees for filing the same are first duly paid.

The act of July 1, 1895, by section 3, provides for the above mentioned personal fees to the Secretary of State, and so much thereof as relates to the present matter reads:

> For each attestation and seal other than herein exempted, fifty cents; for filing and recording each article, charter, certificate of incorporation, not exceeding two hundred words, one dollar; for all recording and copying of records, papers and documents not otherwise provided for, per hundred words (four figures counting as one word), ten cents.

The County Recorder is entitled under Sec. 117 of the "fee and salary act" in force July 1, 1895, to charge for making the record provided for in the incorporation act, ten cents per hundred words, but not less than fifty cents in any one case.

These are all the fees, and include all the price, for which the State of Indiana sells corporation charters. No more is demanded, no more is required. A set price having been fixed by statute, it can not be held, by implication, that a further price is to be required. A charter can not have a *taxable* value because, *first*, it is a mere matter of expense; and, *second*, a new one can be had any day for the same price, and its total value can not therefore be greater than its cost. Besides, a charter of a corporation is owned by the stockholders, and not by the corporation as such.

Therefore, the franchises or privileges which are to be taxed, are such franchises and privileges as are enjoyed (for example) by transportation companies, and which are frequently of great value, and are marketable for large sums, as is a matter of common knowledge.

The laws of Indiana require taxation to be *uniform*, on corporations and individuals alike; and when these laws require the taxation of capital stock and franchises in the case of one, it means precisely the same thing as when they require the taxation of corresponding property in the case of the other. A corporation owning ten thousand dollars of capital stock and a street railway franchise, is to be taxed to the same extent and upon the same amount, as an individual having ten thousand dollars in money and a street railway franchise.

As elsewhere pointed out, the New Jersey cases are not applicable, because the statutes of Indiana do not require any annual payment for corporate charters, or any payment whatever except that required at the time the charters are granted as shown in above-quoted statutes. There is nothing whatever in the laws of Indiana requiring or providing for the payment of anything in the nature of an annual charter tax. And if, as in the case of some other States, an annual charter tax *was* required, it would be a distinct and separate thing, and would not be involved in the present case, or be affected by any of the taxation laws which appellees have called to our attention, and which relate to the taxation of *property* only.

STATE POWERS OVER DOMESTIC CORPORATIONS.

It may be conceded that the State of Indiana might, as a prerequisite for the granting of charters for corporations, have required almost any conditions that it might have seen fit. It might certainly have provided for an annual charter tax. *It has not.* It might perhaps have provided that no corporation organized under its laws should own United States Letters Patent. *It has not.* It may even be conceded for the sake of this argument that it might have provided that if any of its corporations should acquire Letters Patent of the United States, they should return them for taxation, and that they should be taxed, although this is going far beyond what we believe to be a legitimate exercise of the State authority; but the all-sufficient answer to such a proposition, is: *It has not.*

Taxation is a burden, although necessary, even when conducted with the utmost justness and fairness. Such burdens are not to be extended or enlarged by implication. However just and necessary taxes are, their limits are to be defined by the statute law. And acts of taxation officers beyond or outside the statutes are unlawful, invalid, and void. All persons, natural and artificial, are to have the equal protection of the laws, and when they have paid the taxes *lawfully* imposed, their debt, in that respect, to the public, must be considered discharged.

A void law is no law. An unconstitutional law will be treated by the courts as null and void. Each act here complained of was, therefore, a nullity, a mere *brutum fulmen*, and is to be so treated by all persons and under all circumstances, in collateral as well as in direct attack.

This is not modified to any extent nor in any degree by the fact that the appellees were holders of official position and might pose as public officers in their pretended acts of levying these taxes and enforcing their collection. These taxes were not lawful taxes. That is, they were not taxes at all.

The contention that the State has a right to tax its own corporations as it pleases and thus that a different rule may be applied to corporations, in cases like that at bar, from the rule which would govern such cases where individuals are concerned, embodies a fallacy. It is readily conceded that corporations are in some respects different from individuals; and it is equally true, perhaps, that the legislature might enact measures under which the distinction should be still more marked. But no statute has been called to our attention limiting the rights of corporations in respect to the ownership of this class of property. Under what authority, therefore, or for what legal reason, are we to distinguish between the right of ownership in a natural person and the same right in a legal person when and in cases where no law exists for the distinction? Particularly so in cases of taxation, which the Indiana law expressly declares shall be "uniform."

It is not contended that there is any statutory distinction applicable to this case. Indiana has imposed no such distinctions or restrictions upon its corporations. This corporation must, therefore, be held to have the unrestricted right to purchase and own Letters Patent, the same as an individual would have—and to have the same rights under the patents which it may own as an individual would have—and to have no burdens because of such ownership that an individual would not have.

It may, perhaps, be said that a State has plenary power over its domestic corporations; that a State may refuse to create any corporations; or may refuse to create them except for certain purposes; or may refuse them the power to own certain kinds of property. But a State has not the power to

make patents taxable, either directly or indirectly; nor can it, as a matter of law, make that lawful when attempted by indirect methods which is unlawful when attempted by direct methods.

The State of Indiana has *not* passed a law that a manufacturing corporation shall not own patent rights, nor can it, indirectly, under the guise of taxing capital stock, tax those patent rights. If the State of Indiana shall hereafter provide that none of its corporations shall own patents, a different question may be presented, but "sufficient unto the day is the evil thereof." That question is not now before us.

An individual owner of a patent has never been taxed, so far as council for appellant is aware, upon the patent which he owned. Joint owners or co-partners may own a patent; and they are no more to be taxed on their individual interests than a single owner. If the owners of a patent are numerous it is nothing strange that they should organize into a corporation, assign their patents to the corporation, and receive certificates of *stock* of the corporation, in proportion to their interests in such patents, in exchange therefor. Such an organization, as is well known, is considered more convenient than a numerous partnership. But it does not change the character, value, or taxability of the patents, or multiply taxable property.

APPELLANT'S POSITION DISTINGUISHED.

I wish to distinguish clearly and emphatically between appellants' contention in this case—that the State has no power by taxation or otherwise to interfere with the enjoyment—the free, unrestricted enjoyment—of the incorporeal right secured to it by its Letters Patent,—and that other but wholly erroneous position, with which it has sometimes been confounded, which would deprive the State of control of tangible property within its borders simply because it might happen to be the subject of a patent, or the power of police regulation. On the contrary, I desire to say that in my opinion the State has precisely the same right to tax a patented *machine* that it has to tax an unpatented machine. That it has the same right to establish police regulations regarding the use of a patented invention, that it has to

establish police regulations regarding the use of a similar or corresponding unpatented invention. This is a wholly different thing from interfering with, or laying burdens upon, the patent itself—the incorporeal right—which has been granted under the Constitution and laws of the United States; and which—by the very phraseology of the Constitution itself, and of the law itself, and of the patent itself,—is made an *exclusive* right; no more to be invaded or interfered with by a State than by an individual.

The real rights of States in the matter have been defined by the Supreme Court in the cases of *Patterson* v. *Kentucky*, and *Webber* v. *Virginia*, to which attention has already been called in appellant's original brief.

Various courts at various times have declared with more or less emphasis against interference under color of authority of State laws with rights secured by Letters Patent of the United States. These questions have arisen in different ways, but the spirit of the great bulk of decisions bearing in any way upon the question is the same. Among the cases in which questions of this character have been considered are the following:

Read et al. v. *Miller et al.*, 2 Biss. 12; Fed. C. 11,610;
Robinson ex parte, 2 Biss. 309; Fed. Cas. 11,932;
Holliday et al. v. *Hunt*, 70 Ill. 109;
Crittenden v. *White*, 23 Minn. 24;
Helm v. *First Nat. Bk.*, 43 Ind. 167;
Woollen v. *Banker*, 2 Flip. 33; 17 Alb. L. J. 72; Fed. Cas. No. 18,030;
Cranson v. *Smith*, 37 Mich. 309;
May v. *Ralls County*, 31 Fed. Rep. 473;
Gamewell Fire Alarm Tel. Co. v. *New York*, 31 Fed. Rep. 312;
Castle v. *Hutchinson*, 25 Fed. Rep. 394.

Counsel is well aware that the Supreme Court of Indiana has said that decisions of this character were overruled by *Patterson* v. *Kentucky*, *supra*, but if they are carefully examined it will be seen that the questions involved in the last named case had no relation whatever to those involved in the cases above cited. *Grover & Baker S. M. Co.* v. *Butler*, 53 Ind. 454, was undoubtedly substantially overruled in the *Pat-*

terson v. *Kentucky* case; but that case differed widely from the others referred to and it is strange how the Supreme Court of Indiana could ever have fallen into the manifest and undoubted error it did in that case, ostensibly on the authority of the other cases; and it is equally strange how it could have afterwards so misinterpreted the decision in the case of *Patterson* v. *Kentucky*.

The police power of the State is unquestionable. It certainly is not questioned here any more than is the right to tax tangible property, whether the same be patented or not. Patterson had no more right to sell his dangerous illuminating oil in violation of the Kentucky law, because he had a patent on it, than my brother Taylor would have, if he had a patent on a gun, to shoot an unoffending citizen with it in violation of the Indiana law against murder. When he came to be tried for murder, the plea that he owned a patent, if made, would justly be treated as ridiculous; and if, perchance, the verdict should be that he be hanged therefor, the United States would not interfere. But he might own his patent as long as he pleased and his free use and enjoyment of it could not be interfered with—or taxed. Should he engage in the manufacture of fire arms, his manufacturing plant and the product thereof would be subject to taxation. If he engaged in the manufacture of ammunition, he must comply with local laws and regulations regarding the handling of explosive substances. But the patent or patents which he might own—the incorporeal rights—they are his. They can neither be taken away nor rendered subject to taxation or other local interference. These grants are from the sovereign power and —directly or indirectly—in and of themselves they are subject to no manner of State or local regulation. They can be acquired, transferred, used, bought, sold and enjoyed in absolute and unrestricted freedom.

THE DISTINCTION BETWEEN PATENTS AND PATENTED ARTICLES.

Certain quotations from *Patterson* v. *Kentucky*, *supra* (97 U. S. 501), will serve to bring into strong relief the distinction between the powers reserved to the States as police powers and the powers denied to the States by the Federal Constitution and laws concerning patents.

This case was heard upon writ of error to the Kentucky Court of Appeals, which had affirmed the judgment of an inferior State Court, in which upon indictment and trial a fine of $250 was imposed upon plaintiff in error for a violation of certain provisions of a Kentucky statute regulating the inspection and gauging of oils and fluids, such as petroleum, and condemning as unsafe for illuminating purposes such as ignite or permanently burn below a temperature of 130° Fahr. The oil, which was the subject-matter of the sale complained of, was also the subject of certain Letters Patent of the United States, and the plaintiff in error claimed the right to sell it, therefore, notwithstanding the State statutory police regulation above recited.

This Court held that such a construction of the Constitution and laws of the United States was inadmissible, and said:

> By the settled doctrines of this Court, the police power extends, at least, to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, *strictly and legitimately for police purposes*, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by necessary implication, to the National Government. The Kentucky statute under examination manifestly belongs to that class of legislation.
>
> . . . . . .
>
> It is not to be supposed that Congress intended to authorize or regulate the sale, within a State, of *tangible* personal property which the State declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within its limits.
>
> . . . . . .
>
> This Court has never hesitated, by the most rigid rules of construction, to guard the commercial power of Congress against encroachment in the form or under the guise of State regulations established for the purpose and with the effect of destroying or impairing rights secured by the Federal Constitution. It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding State police regulations enacted in good faith, and which

had appropriate and direct connection with that protection to life, health and property which each State owes to its citizens.

. . . . . .

The right which the patent primarily secures is the exclusive right in the discovery, which is an *incorporeal* right, or, in the language of Lord Mansfield, in *Miller* v. *Taylor*, 4 Burr 2303, "a property in notion," which "has no corporeal tangible substance." *The enjoyment of that incorporeal right may be secured and protected by national authority against all hostile State legislation;* but the *tangible* property which comes into existence by the application of the discovery is not beyond the control as to its use of State legislation, simply because the inventor acquires a monopoly in the discovery.

This Court long ago pointed out the distinction between the taxation of a patented article and the taxation of the patent itself, and in dealing with the question Mr. Chief Justice TANEY, speaking for the Court, said:

The distinction is a plain one. The franchise which the patent grants, consists altogether in the right to exclude everyone from making, using or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States.

. . . . . .

But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life, stands on different ground. In using it, he exercises no rights created by the Act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee.

. . . . . .

And when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the Act of Congress.

. . . . . .

The implement or machine becomes his private, individual property, not protected by the laws of the

United States, but by the laws of the State in which it is situated. . . . . Like other individual property, *it is* ***then*** *subject to State taxation;* and from the great number of patented articles now in use, they no doubt, in some of the States, form no inconsiderable portion of its taxable property.

Bloomer v. *McQuewan et al.*, 14 How. 539. (14 L. ed. 532).

These decisions clearly state the law, and exactly coincide with appellant's contentions.

HOW PATENTS ARE "PROTECTED."

At p. 87 of their brief appellees quote from *Crown Cork and Seal Co.* v. *Maryland* to the effect that "patent rights are personal property and entitled to the same protection as other property," citing *Cammeyer* v. *Newton*, 94 U. S. 225 (24 L. ed. 72).

In *Cammeyer* v. *Newton* this Court used the following language:

> Holders of valid letters patent enjoy, by virtue of the same, the exclusive right and liberty of making and using the invention therein secured, and of vending the same to others to be used, as provided by the act of Congress; and the rule of law is well settled that an invention so secured is property in the holder of the patent, and that as such the right of the holder is as much entitled to protection as any other property, during the term for which the franchise or the exclusive right or privilege is granted. *Seymour* v. *Osborne*, 11 Wall. 516 (20 L. ed. 33), 16 Stat. at L. 201.
>
> . . . . . .
>
> Section 22 of the Patent Act provides that every patent shall "contain a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use and vend the said invention or discovery throughout the United States." 16 Stat. at L. 201.
>
> Agents of the public have no more right to take such private property than other individuals under that provision, as it contains no exception warranting any such invasion of the private rights of individuals. Conclusive support to that proposition is found in a recent decision of this Court, in which it is held that the government cannot, after the patent is issued,

> make use of the improvement, any more than a private individual, without license of the inventor or making him compensation. *U. S.* v. *Burns*, 12 Wall. 246 (20 L. ed. 338).

In *Seymour* v. *Osborne*, cited in *Cammeyer* v. *Newton*, the Court stated the matter as follows:

> Inventions secured by letters patent are property in the holder of the patent, and as such are as much entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or the exclusive right is granted.
>
> Letters patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as *public franchises* granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used, their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil and expense in making the inventions and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress.

But how is this protection to be had? The Statutes of the United States, Sec. 629, say that the Circuit Courts of the United States shall have jurisdiction:

> *Ninth.* Of all suits at law or in equity arising under the patent or copyright laws of the United States.

And Sec. 711 says:

> SEC. 711. The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned, shall be *exclusive* of the courts of the several States:
>
> . . . . . .
>
> *Fifth.* Of all cases arising under the patent-right or copy-right laws of the United States.

As a matter of fact, the *protection* to patent property which the owners of such property invoke is always that provided for by the patent laws of the United States. No State can, will, or even pretends to, in any manner protect patent rights.

And if a State protects patented *articles*, it protects them *as articles* merely, and also *taxes* them, as it has a right to do.

"THE RIGHT TO EXCLUDE."

Appellees, in their brief (pp. 77–80), take great pains to establish, by numerous authorities, the elementary proposition, which nobody familiar with patent law ever thought of disputing or questioning, and with which we fully agree, and which exactly accords with our contention, as stated in our principal brief, that all that a patent grant consists of is "the exclusive right in the discovery," or in other words, "in the right to exclude every one from the making, using or vending the thing patented, without permission of the patentee."

They further say—and this is equally axiomatic and undisputed—that the patentee prior to the grant of his patent had the right to manufacture, sell and use the thing in question, just the same as he had afterwards. But so had everybody else! The right, therefore, being a common right, and enjoyed by all mankind, was *valueless* from a property or taxation standpoint. It was like the right to breathe—the right to walk—the right to see—the right to "life, liberty and the pursuit of happiness." These are not *taxable* things. Every schoolboy knows that. And when this is considered, and the fact that it is the exclusive right, or the right to exclude others, only, which constitutes the whole substance and comprises the essential attributes of a patent, and when it is considered that this extends throughout "the entire United States and the Territories thereof," then it is seen how clearly and unmistakably correct must be appellant's contention that it cannot be taxed by local, municipal, or State authority.

Such property does not have its *situs* in any State. It has no local habitation. It extends over the entire country. *Carver* v. *Peck*, and *Stevens* v. *Gladding*, *supra*.

And even in the New York case of *People* v. *Campbell* the Supreme Court of New York, where no opposition was made to the taxation on the grounds here urged, the Court, as elsewhere shown, held that the capital stock invested in patents was not liable to taxation by the New York authorities "except in so far as said Letters Patent of the United States apply to the territory within the State of New York." Had

the entire unlawfulness of such taxation been urged in that case, as it afterwards was in the later case of *People ex rel. Edison Electrical Illuminating Co. of Brooklyn* v. *Board of Assessors of Brooklyn* (main brief, p. 20), it would doubtless have been decided, as it was in the Edison case, that such stock was not taxable at all.

The question again recurs. How is it possible that a patent right—a mere right to exclude others from doing something—which may or may not be exercised—which may or may not be cared for by anybody—which may be valuable to-day, and because of a later invention be valueless to-morrow—which may be valuable to-day when the patent is considered valid, and valueless to-morrow because of a court decision adjudging its invalidity—how can such a thing have a taxable value; and when this right to exclude is derived from, and is a part of, the *sovereign power* of the United States, how can it be subject to any burden whatever by a subordinate authority?

This has no relation whatever to the *police powers* of States. The police power acts upon *tangible* things, and *not* upon intangible rights. If a patented article can not be used at all because of police regulations, that is a different question. Or if it must be used in a certain manner in order to satisfy the police regulations enacted for the safety of the people, that is also a different matter. None of these questions are involved here. The question here is the right of the State to tax this mere naked, intangible, "right to exclude".

SHARES—CAPITAL STOCK.

In the latter part of their brief appellees advance the proposition:

> It may be that a tax upon stock that had been exchanged for patent rights would remotely have the value of such patent rights, but are the States to be prohibited from taxing such *shares* of stock because remotely the value of some patent right is affected?

This proposition embodies several fallacies as applied to the present case. In the first place it is not "*shares* of stock" that is attempted here to be taxed, but the *capital stock*. We have no interest, in this case, in the question of whether such

shares of stock might be exchanged for patent rights or whether such exchange would (nearly or remotely) affect the value of patents owned by the company issuing such shares. These matters have elsewhere been fully discussed, and are only adverted to here for the purpose of showing the unsoundness of the above quoted proposition.

CONTRACT RIGHTS.—GOVERNMENTAL INTEREST.

Also in the latter of appellees' brief (p. 106) we find the two propositions that "no law has been passed violating any contract rights of appellant. The laws were in force when appellant came into existence." And (p. 100) that the Government "does not have any *stock* or *interest* in The Indiana Manufacturing Company."

Now this shows an utter misapprehension, or a clear attempt at evasion, of the issues involved.

It is true that the present Indiana law requiring the taxation of patents was passed shortly before The Indiana Manufacturing Company was incorporated. But the contract (or contracts) between The Indiana Manufacturing Company and the United States, or in other words, the Letters Patent granted by the United States to The Indiana Manufacturing Company, were issued under and founded upon the Constitution of the United States; which instrument, in point of antiquity, as well as in point of dignity, is, we think, the superior of the Indiana tax law; and it was adopted before the State of Indiana came into existence—if the matter of date of existence has any bearing upon the question. And the statutes of the United States governing the granting of patents are in exact accordance with the section of the Constitution relating to the subject; and these contracts are formulated and issued in exact accordance with the Constitution and the statutes; and they relate back to, and partake of, the authority of this Constitution, and these statutes, by virtue and force of which they are issued and exist.

Dodge v. *Woolsey*, 18 How. 331 (15 L. ed. 401), is a case where this Court expressly decided that a State could not impair or violate a contract, even by the extraordinary means of enacting a new constitution.

And it is cheap argument to say that the Government has "no interest" in The Indiana Manufacturing Company, after having granted it its Letters Patent. It is tantamount to saying that the Government of the United States has no interest in protecting its Letters Patent, or in seeing that its patentees are sustained in their rights thereunder. Startling proposition! That this great Government—"of the people, by the people, for the people"—has no interest in the honest execution of its contracts, because, forsooth, its statutory fees having been paid under proceedings which resulted in the grant, there is no further direct pecuniary return to the Treasury.

As well might the gentlemen say that this great Court, organized for the purpose of seeing that justice be done, has no interest in the proper determination of such cases brought before it as do not affect your Honors' salaries or the public revenues.

To these lengths would such a theory, if pursued to its legitimate conclusion, lead us. We protest against anything tending in such a direction.

If we are to be defeated here, let it not be for any such reasons or upon any such grounds. Appellant, at least, will not seek to so demean this case. Believing itself morally, as well as legally, in the right, it comes here with every confidence that its contentions will be upheld; but should we perchance be mistaken in the law, we feel confident that an adverse decision, if one be rendered, will be because it is found to be the law, and not because this great Government has no regard for the proper execution of its contracts.

FURTHER ILLUSTRATIONS AND AUTHORITIES.

It seems almost a work of supererogation to continue this argument further. Nevertheless, a few illustrations may not be inapt:

Greenbacks—money—until the time when Congress by express legislation gave the right,—was not taxable because issued by the Government of the United States.

Bank v. *Supervisors*, 7 Wall, 26 (19 L. ed. 60);
The Banks v. *The Mayor*, 7 Wall. 16 (19 L. ed. 57);
Ogden v. *Walker*, 59 Ind. 462.

Even the salaries of officers of the Government of the United States cannot be taxed by a State.

Dobbins v. *Commissioners Erie Co.*, 16 Pet. 435 (10 L. ed. 1022.)

The general power of a State to tax does not extend to agencies of the General Government.

State v. *Garton*, 32 Ind. 1.

W. U. Tel. Co. v. *Richmond*. 26 Gratt. (Va.) 1.

When legal part of taxes has been fully paid, illegal remainder cannot be enjoined.

Tallasee Mfg Co. v. *Spigener*, 49 Ala. 262.

As to the right to maintain a suit in equity and to secure an injunction, where a part of the taxes in controversy would be paid to the State and thus become irrecoverable, if paid, see

[illegible] 616: Fed. Cas. No. 4913.

As long ago at least as *Grant* v. *Raymond* (6 Pet., 218, 241) this Court declared it to be a part of the policy or "settled purpose" of the Government to promote the progress of the useful arts by granting letters-patent giving these exclusive rights; and what was then said by Chief Justice MARSHALL has been approvingly quoted as lately as May 19th of the present year:

Bement v. *National Harrow Company*, 186 U. S., 70.
Grant v. *Raymond*, 6 Pet., 218.

personal property [illegible]
lead to a multiplicity of suits, or where the law [illegible] the tax is illegal, or where there is no means of recovering back from the State taxes illegally assessed.

City Nat'l Bank v. *Paducah*, Fed. Cas. No. 2,743;
First Nat'l Bank v. *County of Douglas*, *supra*.

It is a general and well recognized rule that an injunction will lie against the collection of a tax upon property which is exempted by law from taxation. The case is, at least, as strong, where to levy a tax would be an infringement of rights

And it is cheap argument to say that the Government has "no interest" in The Indiana Manufacturing Company, after having granted it its Letters Patent. It is tantamount to saying that the Government of the United States has no interest in protecting its Letters Patent, or in seeing that its patentees are sustained in their rights thereunder. Startling proposition! That this great Government—"of the people, by the people, for the people"—has no interest in the honest execution of its contracts, because, forsooth, its statutory fees having been paid under proceedings which resulted in the grant, there is no further direct pecuniary return to the Treasury.

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Foote v. *Linck*, 5 McLean, 616; Fed. Cas. No. 4913.

See also

First Nat'l Bank of Omaha v. *County of Douglas et al.*, 3 Dillon, 298; Fed. Cas. 4,809,

In which are distinct and careful rulings on the questions, by Mr. Justice MILLER.

See also

37 Wis. 75; 42 Wis. 502; 43 Wis. 48;
43 Wis. 55, and 45 Wis. 519.

A number of authorities bearing upon the question involved in this case are collected and discussed in the opinion of Mr. Justice MATTHEWS in

Pullman Southern Car Co. v. *Nolan*, 22 Fed. Rep. 276.

Injunction will lie to restrain the collection of a tax on personal property where the enforcement of the tax would lead to a multiplicity of suits, or where the law authorizing the tax is illegal, or where there is no means of recovering back from the State taxes illegally assessed.

City Nat'l Bank v. *Paducah*, Fed. Cas. No. 2,743;

First Nat'l Bank v. *County of Douglas*, *supra*.

It is a general and well recognized rule that an injunction will lie against the collection of a tax upon property which is exempted by law from taxation. The case is, at least, as strong, where to levy a tax would be an infringement of rights

clearly derived from Federal laws, as where there is an express statutory exemption. In other words, it is no less an exemption by law when the condition is clearly deducible from existing constitution and laws, than when there is a particular act exempting the property by set phrase.

TAXATION OF PROPERTY ISSUED BY THE UNITED STATES.

Much has been said in respect to the taxation of the *shares* of national banking associations, notwithstanding that the *capital* of such associations is partly or wholly invested in United States bonds.

This Court has uniformly held that *capital stock* when so invested can not be taxed. It has held that the "shares" *may* be taxed. The questions here involved are similar, and the right of this Court to determine them is the same as in the cases in question.

In the elaborate and learned decision in the case of *People ex rel. Bank of Commerce* v. *Commissioners of N. Y.* 2 Black, 620 (17 L. ed. 451), Mr. Justice NELSON, speaking for the Court, said:

> A court may appropriately determine whether property taxed was or was not within the taxing power, but if within, not that the power has or has not been discreetly exercised.

And after some further discussion of the questions involved, quoting from *Weston* v. *City of Charleston*, 2 Pet. 449 (17 L. ed. 481), said:

> "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe."

This decision was followed a little later by the case of *People ex rel. Bank of Commonwealth* v. *Commissioners of N. Y.* 2 Wall. 200 (17 L. ed. 793), which came up after further legislation by the State of New York; and the Court came to the following conclusion:

> Having come to the conclusion that the tax on the **capital** of the Bank of the Commonwealth is a tax upon the **property** of the institution, and which **consists** of the stocks of the United States, we do

not perceive how the case can be distinguished from the cases heretofore before the court, and reported in 2 Black 620.

Then followed the case of *People ex rel. The Banks* v. *Hoffman*, 7 Wall. 16 (19 L. ed. 57), in which after citing and quoting from *Weston* v. *Charleston*, Chief Justice CHASE said:

> Nothing need be added to this, except that in no case decided since have these propositions been retracted or qualified.
>
> . . . . . .
>
> The principle of exemption is, that the States cannot control the National Government within the sphere of its constitutional powers—for there it is supreme—and cannot tax its obligations for payment of money issued for purposes within that range of powers, because such taxation necessarily implies the assertion of the right to exercise such control.

Then followed *People ex rel. Bank of New York* v. *Supervisors*, in which the same principle was asserted.

Then came *First National Bank of Louisville* v. *Commonwealth of Kentucky*, 9 Wall. 353 (19 L. ed. 701). In this case Mr. Justice MILLER said:

> A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the government it could not be taxed, nor could the corporation be taxed as the owner of such securities.

Now, these cases abundantly show that when capital of a corporation is invested in any class of property which is not taxable at all because issued by the Government of the United States, such capital cannot be taxed, any more than the property invested in it could be. This is the direct conclusion of this Court in the cases which have been cited. And the Court has declined to recede from or modify these decisions in any respect. They have not been "retracted or modified."

WILL TAXABLE PROPERTY ESCAPE TAXATION?

Appellees, at page 83 of their brief, attempt to make a point of the large amount of property which they say will escape taxation if appellant shall prevail in the present case.

Now, this is entirely erroneous. There is not, and has not been claimed to be, a single dollar "invested" here so as to escape taxation.

As has elsewhere been pointed out, if any moneys have been "invested" anywhere, these moneys are still subject to taxation. If anybody had $360,000 which was taxable and paid it out for these patents, which were non-taxable, the money was simply transferred from one hand to another and is as taxable in the new hands as it was in the former hands. Nothing has been withdrawn from taxation; the money is still in somebody's hands and is taxable, and presumably is taxed.

The creation of capital stock of corporations neither adds to nor subtracts from the taxable property in existence. The subsequent operations of a corporation may be profitable and result in earnings. If so, these earnings are taxable and are taxed. Some of the stockholders of the appellant company may be worth more than they were at its formation because of the earnings which have been made and paid to them. If so, they have thus been enabled to pay, and *have* paid, larger taxes than they otherwise would have done. The corporation has also paid taxes (on the undistributed earnings) and to that extent the taxing powers have been benefited.

Now, there is nothing in this that is prejudicial to taxation, or which reduces taxable property. The tendency is the other way, and no manufacturing company can escape taxation on its capital stock which does *not* consist of patent rights because it may own patent rights which it uses in its business. It is only when the capital stock is *directly* invested in patent rights that the rule of non-taxability applies. For example, should a company be incorporated with $1,000,000 capital, of which $500,000 was cash and $500,000 patent rights, the cash capital would be taxable and the patent right capital would not be taxable. If, however, a corporation is formed with $1,000,000 capital all in cash, and it afterward merely buys (or otherwise acquires) patents as an *incident* to its manufacturing business, that is a wholly different thing. It has, and can have, no bearing upon the question under consideration. Ordinary manufacturing companies are incorporated with a cash or taxable-property capital. It is

only in exceptional cases, where Letters Patent are of great and preponderating value, that companies are formed of the character of appellant and where such a question as this can arise.

Now all this is beside the merits of the case. It of course, makes no difference to this Court what the *result* of a rightful and lawful decision may be. Nevertheless, the point having been made by appellees, it has been thought best to answer it, in order that there might be no misapprehension upon the subject, or upon the question of what would be the result of what we conceive to be a proper decision of the question presented.

EVIDENCE NOT IN THIS RECORD.

Appellees, in their brief (pp. 62–65), attempt to lay a foundation for an argument by stating that certain evidence

Now, this is entirely erroneous. There is not, and has not been claimed to be, a single dollar "invested" here so as to escape taxation.

As has elsewhere been pointed out, if any moneys have been "invested" anywhere, these moneys are still subject to taxation. If anybody had $360,000 which was taxable and paid it out for these patents, which were non-taxable, the money was simply transferred from one hand to another and is as taxable in the new hands as it was in the former hands. Nothing has been withdrawn from taxation; the money is still in somebody's hands and is taxable, and presumably is taxed.

The creation of capital stock of corporations neither adds to nor subtracts from the taxable property in existence. The

The bill alleges that the taxing officers **actually knew** that appellant's capital stock consisted of patent rights.

Not only this, but it shows that they **must necessarily** have known that fact.

The **first** things that come before these officers, in assessing taxes, are the "assessment lists" and "tax statements"; **and the quotations from these in the bill show that the facts in respect to this matter were conspicuously included in such lists and statements, so that the taxing officers, on first taking them up, could not fail to be informed of the facts.**

See for example, the allegations concerning 1898, beginning on page 11 of the record, in the 6th line from the bottom, and continuing to and including the 15th line on page 12.

Also lines 12 to 29, page 19, for 1900.

Then the first suit was brought in 1894, and they certainly knew about the matter then and thereafter.

only in exceptional cases, where Letters Patent are of great and preponderating value, that companies are formed of the character of appellant and where such a question as this can arise.

Now all this is beside the merits of the case. It of course, makes no difference to this Court what the *result* of a rightful and lawful decision may be. Nevertheless, the point having been made by appellees, it has been thought best to answer it, in order that there might be no misapprehension upon the subject, or upon the question of what would be the result of what we conceive to be a proper decision of the question presented.

EVIDENCE NOT IN THIS RECORD.

Appellees, in their brief (pp. 62–65), attempt to lay a foundation for an argument by stating that certain evidence is found in the record of another case; and following (pp. 65–70) attempt to support this argument by certain authorities.

Appellant's counsel knows of no law or rule under which such a practice can be justified, and will, therefore, pay no further attention to this matter.

CONCLUSION.

Much of appellant's argument in this case is devoted to traversing propositions, advanced by appellees, which appellant believes to be outside the issues of the case, but which nevertheless have been discussed for the purpose of showing that even upon such issues, the right and justice of the controversy are with the appellant. If the Court shall adopt appellant's views, it will, of course, ignore these matters in making its decision.

The real issue is, as appellant conceives it: Did appellees tax (or attempt to tax) appellant's patents, directly or indirectly? Appellees' contention is that the tax was levied, not upon apellant's patents, but upon its stock. Appellant replies that its stock was issued for these patents, and for nothing else but the patents and is merely the *representative* of the patents, and that any tax upon the stock is, therefore, a tax upon the patents—indirect if you will—but no less truly.

It may be that these taxing officers have a right under some circumstances to tax capital stock. Appellant conceives it to be unnecessary to decide that question. They may, and probably can, lawfully tax some classes of franchises, but it seems equally unnecessary to pass upon that proposition. They cannot, however, tax franchises granted by the Government of the United States in the exercise of its "paramount sovereignty."

No amount of lawfulness of *method* can give vitality to *void proceedings*. No multitude of authorities, being cases where there was a valid foundation for an action, can support a proceeding where there was no lawful foundation. No State statutes; no tribunals established under them; no obscuration of issues, or elaboration of matters not properly in issue; no "ingenuity of argumentation," can ever establish in State or municipal authorities, so long as the Constitution and laws of the United States remain as they are, the right to tax Letters Patent of the United States.

Nor, so long as courts of justice follow established rules, can any *indirect* method, however skillfully conceived, or however powerfully supported, require, or it is believed will induce, a court, especially a court of equity, to pronounce lawful, that which when attempted by direct methods must be pronounced unlawful.

The matter may be summarized as follows: The taxing officers of the State of Indiana require of appellant a return for taxation in a certain form, and furnish the blank forms for such return. Appellant complied with these requirements, and furnished the returns under oath, showing fully and fairly the property of which it was possessed. That property consisted almost exclusively of "patent rights" or Letters Patent of the United States. The correctness of these returns has never been called in question or disputed or attacked in any way. The entire capital stock was actually issued for and consisted in these Letters Patent or patent rights, and nothing else. The record further shows that except for the value of these Letters Patent or patent rights appellant would be wholly and hopelessly insolvent, and that it had no other property of any name or description, save the

moderate amount which was returned for taxation and on which all taxes due had been fully paid.

Notwithstanding all these facts appellees assumed a sheerly capricious right to ignore these duly verified and uncontradicted statements, invited by them and received by them in the course of their duty, although there was before them neither evidence nor fact to the contrary, and to levy and assess upon appellant's stock, which was issued for nothing and represented nothing but its Letters Patent or patent rights, the taxation complained of.

It seems wholly unnecessary to follow the Attorney-General through the many and intricate legal ramifications which he has presented to the Court. This case ought not, in appellant's counsel's opinion, to be determined upon any such considerations. The authorities do not, in his opinion, apply. On the contrary, those heretofore cited in this brief apply, if, indeed, citation of authorities is necessary.

This Court is not called upon to ascertain the "valuation" at all; or to determine whether or not the patents have any value. The point to be determined is whether or not the patents are taxable at all.

It seems clear that they are not—directly or indirectly—for the reasons which have been given.

The tax complained of is all wrong or all right. If patents are taxable, we make no complaint concerning the valuation.

It is respectfully submitted that the finding and decree should be reversed at the costs of appellees, and the cause remanded with directions to enter a decree in accordance with the prayer of appellant's bill of complaint.

CHESTER BRADFORD,
Solicitor and of Counsel for Appellant.

F. WINTER,
Of Counsel.

INDIANAPOLIS, INDIANA, October 15, 1902.

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